United Nations

Report of the Preparatory Committee on the Establishment of an International Criminal Court

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Volume II

(Compilation of proposals)

General Assembly
Official Records • Fifty-first Session
Supplement No. 22A (A/51/22)

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NOTE

Symbols of United Nations documents are composed of capital letters combined with figures. Mention of such a symbol indicates a reference to a United Nations document.

VOLUME II

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[13 September 1996]

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Preamble*

I. ILC DRAFT

The States parties to this Statute,

Desiring to further international cooperation to enhance the effective prosecution and suppression of crimes of international concern, and for that purpose to establish an international criminal court;

Emphasizing that such a court is intended to exercise jurisdiction only over the most serious crimes of concern to the international community as a whole;

Emphasizing further that such a court is intended to be complementary to national criminal justice systems in cases where such trial procedures may not be available or may be ineffective;

Have agreed as follows:

II. PROPOSALS

Desiring to further international cooperation ...;

Emphasizing that such a court is intended ...;

[**Recognizing that it is the primary duty of States to bring to justice persons responsible for such serious crimes;**]

Emphasizing further that such a court is intended to be complementary to national criminal justice systems [**in cases where such systems may be ineffective** AND/OR **in cases where national jurisdiction is unavailable**] (in cases where such trial procedures may not be available or may be ineffective);

---

* Note concerning the preamble and articles 1 to 4 and 20 to 24

Unless otherwise indicated, where the text of proposals is based on the original text of the ILC draft statute, the latter is reproduced in ordinary type and delegations' proposals for amendment appear in bold type.

Where a deletion of text has been proposed, the original text is surrounded by parentheses which are in bold type. Where an addition to the text has been proposed, the original text is interrupted by square brackets, which contain the proposed addition in bold type.

This compilation is not exhaustive. The texts included do not reflect any generally held views. The Committee did not discuss these texts and does not wish to prejudge the future positions of delegations.

This compilation has been prepared on the basis of the proposals made in the March-April meeting of the Preparatory Committee (A/AC.249/1, annexes I-VI) and the written proposals submitted at the August meeting of the Preparatory Committee (A/AC.249/L.3).

OR

Emphasizing further that the international criminal court shall complement national criminal justice systems when they are unable or unwilling to fulfil their obligations to bring to trial such persons;

PART 1. ESTABLISHMENT OF THE COURT

Article 1

The Court

I. ILC DRAFT

There is established an International Criminal Court ("the Court"), whose jurisdiction and functioning shall be governed by the provisions of this Statute.

II. PROPOSALS

There is established an International Criminal Court ("the Court") [**which shall be complementary to national criminal justice systems. Its jurisdiction and functions**] (whose jurisdiction and functioning) shall be governed by the provisions of this Statute.

* * *

A Permanent International Criminal Court ("the Court"), whose jurisdiction and functioning shall be governed by the provisions of this Statute, is hereby established.

Article 2

Relationship of the Court to the United Nations

I. ILC DRAFT

> The President, with the approval of the States parties to this Statute ("States parties"), may conclude an agreement establishing an appropriate relationship between the Court and the United Nations.

II. PROPOSALS

The Court shall, as soon as possible, be brought into relationship with the United Nations. It shall constitute one of the specialized agencies provided for in Article 57 of the Charter of the United Nations. The relationship shall form the subject of an agreement with the United Nations pursuant to Article 63 of the Charter.

The agreement, proposed by the Presidency of the Court, shall be submitted to the General Assembly of the States parties for approval. It shall provide the means for establishing effective cooperation between the Court and the United Nations in the pursuit of their common aims. It shall, at the same time, set forth the autonomy of the Court in its particular field of competence, as defined in this Statute.

Article 3

Seat of the Court

I. ILC DRAFT

1. The seat of the Court shall be established at ... in ... ("the host State").

2. The President, with the approval of the States parties, may conclude an agreement with the host State establishing the relationship between that State and the Court.

3. The Court may exercise its powers and functions on the territory of any State party and, by special agreement, on the territory of any other State.

II. PROPOSALS

1. The seat of the Court shall be established at ... in ... ("the host State").

The Presidency of the Court shall submit for the approval of the General Assembly of the States parties an agreement establishing relations between the host State and the Court.

2. The Court may also, for a particular case and when travel by the members of the Court is likely to make the proceedings simpler and less costly, sit in a State party other than the host State.

The Presidency of the Court shall make inquiries with the State party that appears likely to receive the Court.

After the State party likely to receive the Court has agreed, the decision under the preceding paragraph to hold a session away from the Court's seat shall be taken by the General Assembly of the States parties, which shall be informed either by one of its members, the Presidency, the Prosecutor or the General Assembly of Judges of the Court.

With the express agreement of the State party receiving the Court, the privileges, immunities and facilities provided for in article x shall continue to be effective when the Court holds a session pursuant to the three preceding subparagraphs.

3. The provisions of paragraph 2 of this article shall also apply to non-party States which, after inquiries by the Presidency, state that they agree to receive the Court and to grant the privileges, immunities and facilities provided for in article x.

Article 4

Status and legal capacity

I. ILC DRAFT

1. The Court is a permanent institution open to States parties in accordance with this Statute. It shall act when required to consider a case submitted to it.

2. The Court shall enjoy in the territory of each State party such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes.

II. PROPOSALS

1. The Court is a permanent institution open to States parties under the conditions set out in this Statute. It shall act when required to consider a case submitted to it.

2. Without prejudice to the provisions of paragraph 1 of this article, the Presidency, the Preliminary Investigations Chambers, the Procuracy and the Registry shall perform their functions at the Court on a permanent basis.

3. When the Presidency considers that the Court's case-load requires the permanent presence of all the judges of the Court, it shall so inform the General Assembly of the States parties, which may decide that all judges shall perform their duties full-time, for a period determined by the General Assembly or until further notice.

PART 2. COMPOSITION AND ADMINISTRATION OF THE COURT

Article 5

Organs of the Court*

I. ILC DRAFT

The Court consists of the following organs:

(a) a Presidency, as provided in article 8;

(b) an Appeals Chamber, Trial Chambers and other chambers, as provided in article 9;

(c) a Procuracy, as provided in article 12; and

(d) a Registry, as provided in article 13.

II. PROPOSALS

UNITED STATES OF AMERICA

Throughout the text

(a) Replace the term "Presidency" by the term "Administrative Council";

(b) Replace the term "President" by the term "Chief Judge";

(c) Replace the term "Vice-President" by the term "Deputy Chief Judge".

UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

Replace the term "Procuracy" by the term "Prosecutor's Office".

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* Note concerning articles 5 to 19

The following is a compilation which was prepared by an informal group and contains written proposals submitted by various delegations to the Preparatory Committee in the course of discussion on issues pertaining to the composition and administration of the International Criminal Court. Nothing in this compilation necessarily represents the final position of the delegations which submitted the proposals.

The compilation is not exhaustive and does not necessarily reflect any generally held views. The informal group did not discuss the proposals and does not wish to prejudge the future position of the delegations. The informal group compiled notes submitted by certain delegations. Such compilation of notes is not intended to be comprehensive.

FRANCE

The Court shall consist of the following organs:

(a) a Presidency, as provided for in article ...;

(b) Preliminary Investigations Chambers, as provided for in article ...;

(c) Trial Chambers, an Appeals Chamber and a Remand Chamber, as provided for in article ...;

(d) a procuracy, as provided for in article ...;

(e) a Registry, as provided for in article ...; and

(f) a General Assembly of Judges, consisting of all the judges of the Court.

NETHERLANDS

Insert after subparagraph (b) the following subparagraph (b.1):

"(b.1) an Investigative Judge, as provided in article 26 (2) (c);"

Article 6

Qualification and election of judges

I. ILC DRAFT

1. The judges of the Court shall be persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to the highest judicial offices, and have, in addition:

(a) criminal trial experience;

(b) recognized competence in international law.

2. Each State party may nominate for election not more than two persons, of different nationality, who possess the qualification referred to in paragraph (1) (a) or that referred to in paragraph 1 (b), and who are willing to serve as may be required on the Court.

3. Eighteen judges shall be elected by an absolute majority vote of the States parties by secret ballot. Ten judges shall first be elected, from among the persons nominated as having the qualification referred to in paragraph 1 (a). Eight judges shall then be elected, from among the persons nominated as having the qualification referred to in paragraph 1 (b).

4. No two judges may be nationals of the same State.

5. States parties should bear in mind in the election of the judges that the representation of the principal legal systems of the world should be assured.

6. Judges hold office for a term of nine years and, subject to paragraph 7 and article 7 (2), are not eligible for re-election. A judge shall, however, continue in office in order to complete any case the hearing of which has commenced.

7. At the first election, six judges chosen by lot shall serve for a term of three years and are eligible for re-election; six judges chosen by lot shall serve for a term of six years; and the remainder shall serve for a term of nine years.

8. Judges nominated as having the qualification referred to in paragraph 1 (a) or 1 (b), as the case may be, shall be replaced by persons nominated as having the same qualification.

II. PROPOSALS

FRANCE

1. The judges of the Court shall be persons of high moral character and possess all the qualifications required for appointment to the highest judicial offices. They shall, in addition, have great practical criminal trial experience or recognized competence in international criminal law. They shall

also possess an excellent knowledge of and be fluent in at least one of the working languages referred to in article 25.

2. Each State Party may nominate for election not more than three persons who are willing to serve as may be required on the Court.

3. The judges shall be 24 in number. They shall be elected by the General Assembly of the States Parties. No two judges may be of the same nationality. States Parties shall endeavour in the election of the judges to ensure that the principal legal systems of the world are represented.

4. A judge's term of office shall be nine years. It shall end in all cases when the judge reaches 75 years of age. Judges shall not be eligible for re-election, subject to the provisions of paragraphs 5 and 6 of this article. In addition, a judge who has started to hear a case shall continue to deal with it, even beyond the limit fixed by this article.

5. Following the first election of the judges, eight judges chosen by lot shall serve for a term of three years, eight more for a term of six years, and the remaining eight for a term of nine years. The judges chosen for a term of three years shall be eligible for re-election.

UNITED STATES OF AMERICA

1. The judges of the Court shall be persons of high moral character, impartiality and integrity who are qualified for the practice of law and have, in addition:

(a) [at least five years] experience in the conduct of criminal proceedings [as judge, Prosecutor, or defending attorney], and/or

(b) recognized competence in [relevant] international law.

2. (a) When an election is required, the Nominating Committee shall develop a list of candidates, equal in number to the number of positions to be filled, taking into account such views as may be submitted to it by the Presidency, the Procuracy and States Parties and such other sources as the Committee may consult. [In addition to the mandatory requirements set forth in this article, the Committee shall consider as desirable criteria the degree of excellence in meeting the mandatory requirements, technical ability in professional skills and expertise in criminal law.]

(b) The Nominating Committee shall be composed by the [Secretary-General of the United Nations] [Assembly of States Parties] [the Chairmen of the Regional Groups] and shall consist of two members from each Regional Group, selected from among nominations by States party.

(c) Once the Nominating Committee is established, the Registrar shall provide the Committee, upon request, with any necessary facilities and administrative and staff support.

3. [12-24?] judges shall be elected by an [absolute majority] [two-thirds majority] vote of the States Parties by secret ballot. In the event that a sufficient number of judges is not elected, the Nominating Committee shall provide a further list of candidates and there shall be another election.

[Election may be by diplomatic note, with the results to be compiled and announced by the Depositary or, once the Court is established, the Registrar.]

4. No two judges may be nationals of the same State, nor may any judge be over the age of [?] at the time of nomination.

5. In compiling the nominations, the Nominating Committee should bear in mind that the representation of the principal legal systems of the world should be assured and should aim for overall balanced representation of geographic regions [and cultures] and representation of women as well as men [gender balance] [gender diversity]. [At least two thirds of the candidates should have experience in criminal proceedings.]

6. Judges hold office for a term of [nine years and, subject to paragraph 7 and article 7 (2), are not eligible for re-election] [six years and may be re-elected]. A judge shall continue in office in order to complete any case the hearing of which has commenced.

7. At the first election, [six] [?] judges chosen by lot shall serve for a term of [three] [two] years and are eligible for re-election; [six] [?] judges chosen by lot shall serve for a term of [six] [four] years; and the remainder shall serve for a term of [nine] [six] years. [In the event that the number of judges is increased at any stage, the terms of the additional judges shall be similarly staggered.]

[Note: This allows for a decision to increase the number of judges, but the means by which this decision is made depends on overall administrative arrangements and will be addressed elsewhere.]

Article 6, paragraph 1

SINGAPORE AND TRINIDAD AND TOBAGO

Insert at the end of subparagraph 1 (a) the words "as an advocate or as a member of the judiciary."

PORTUGAL

Paragraph 1 of article 6 should read:

"The judges of the Court shall be persons of high moral character, independence, impartiality and integrity who are highly competent jurists and have, in addition:

"(a) criminal trial experience [insert the proposal of Trinidad and Tobago]; and/or

"(b) recognized competence in international law."

SWITZERLAND

Replace paragraph 1 of article 6 by the following:

"The judges of the Court shall be persons of the highest moral character, impartiality and integrity who, in their respective countries, fulfil the requirements for the exercise of the highest judicial offices. In the composition of the Court and its Chamber, due account shall be taken of the experience of the judges in criminal law and international law, including international humanitarian law and human rights law."

UNITED KINGDOM

In paragraph 1, delete subparagraphs (a) and (b) and insert after the words "in addition" the words "criminal trial experience and, where possible, recognized competence in international law".

JAPAN

Replace subparagraph 1 (b) by the following: "recognized competence in international law or criminal law".

FINLAND

Insert in subparagraph 1 (b) after the words "international law" the following: ", including international humanitarian law and human rights law."

ALGERIA, EGYPT, JORDAN, KUWAIT, LIBYAN ARAB JAMAHIRIYA AND QATAR

The qualification of judges should be the same as those formulated in the ICTFY statute. The principle of equitable geographic distribution and other factors are needed to achieve diversity and balance. Experience in criminal matters (judicial prosecutorial or defence advocacy) is, in part, necessary, but not to the exclusion of other expertise. The words of article 6 "... for appointment to the highest judicial offices ..." are too limiting since most legal systems do not have judicial appointments but career judges. This present formulation means that only career judges are eligible, and therefore, this formulation should be changed. We share the views of other delegations that gender representation is necessary, but voice our opposition to a quota system. It would be useful to have a nomination and screening process by the Committee of States Parties.

Article 6, paragraph 2

FINLAND

Insert at the end of the paragraph:

"Persons over [65] years of age at the time of election shall not be nominated for election."

SINGAPORE

Amend paragraph 2 as follows:

"Each State Party may nominate for election not more than two persons of different nationality, who possess the qualification referred to in paragraph 1 (a) or that referred to in paragraph 1 (b), who are not above the age of [61/66] years at the time of election, and who are willing to serve as may be required on the Court."

SWITZERLAND AND UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

Replace the words "the qualification referred to in paragraph 1 (a) or that referred to in paragraph 1 (b)" by the words "the qualifications referred to in paragraph 1".

UNITED KINGDOM

Replace the words "each State Party" by "each national group".

ALGERIA, EGYPT, JORDAN, KUWAIT, LIBYAN ARAB JAMAHIRIYA AND QATAR

As stated by other delegations, a judge nominated by a State Party can be a national of any other State. This would broaden the universality of a Court and allow for a broader choice of qualified candidates.

Article 6, paragraph 3

CHINA

Replace paragraph 3 by the following: "The judges shall be elected by the General Assembly of the United Nations."

UNITED KINGDOM

Replace paragraph 3 by the following: "The judges of the Court shall be elected by the General Assembly and the Security Council from a list of persons nominated by national groups appointed for the purpose by their Governments."

SWITZERLAND

Replace paragraph 3 by the following: "Twelve judges shall be elected, by secret ballot, by an absolute majority of the Assembly of States Parties."

ALGERIA, EGYPT, JORDAN, KUWAIT, LIBYAN ARAB JAMAHIRIYA AND QATAR

The overall number of judges should be determined at a later stage. The proposals of 18 and up to 24 by several delegations are reasonable, but consideration should be given to the subsequent appointment of judges if the volume of work of the Court requires it. Such a mechanism should be established without the need to amend the statute.

Article 6, paragraph 5

CHINA

Replace paragraph 5 by the following:

"In the election of the judges, the representation of the main forms of civilization and of the principal legal systems of the world and the equitable geographical distribution should be assured in the Court as a whole."

DENMARK, FINLAND, MALAWI, NEW ZEALAND, NORWAY AND SWEDEN

Replace paragraph 5 by the following:

"In the election of the judges, States Parties should bear in mind that in the Court as a whole the representation of the principal legal systems of the world, equitable geographical distribution and gender balance should be assured."

Article 6, paragraph 6

CHINA

Replace paragraph 6 by the following: "The judges may hold office for a term of nine years and be eligible for re-election."

DENMARK

Insert the following as a second sentence: "Judges shall retire at the age of [70/75]."

TRINIDAD AND TOBAGO

Add the following words at the end of the paragraph:

"on the understanding that the matter be concluded within five years."

ALGERIA, EGYPT, JORDAN, KUWAIT, LIBYAN ARAB
JAMAHIRIYA AND QATAR

The term of office should be limited in number of years, for example, five years with only one potential renewal. Also an age limit of 70 years should be established.

Article 6, paragraph 7

UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

Replace the words "six judges" wherever they appear by the words "five judges"

Article 6, paragraph 8

SWITZERLAND AND UNITED KINGDOM

Delete paragraph 8.

Article 7

Judicial vacancies

I. ILC DRAFT

1. In the event of a vacancy, a replacement judge shall be elected in accordance with article 6.

2. A judge elected to fill a vacancy shall serve for the remainder of the predecessor's term, and if that period is less than five years is eligible for re-election for a further term.

II. PROPOSALS

FRANCE

In the event of a vacancy, a new election shall be held in accordance with this article. A judge elected to fill a vacancy shall serve for the remainder of the predecessor's term. If the remainder of the term is less than three years, he shall be eligible for re-election for a further term.

Article 8

The Presidency

I. ILC DRAFT

1. The President, the first and second Vice-Presidents and two alternate Vice-Presidents shall be elected by an absolute majority of the judges. They shall serve for a term of three years or until the end of their term of office as judges, whichever is earlier.

2. The first or second Vice-President, as the case may be, may act in place of the President in the event that the President is unavailable or disqualified. An alternate Vice-President may act in place of either Vice-President as required.

3. The President and the Vice-Presidents shall constitute the Presidency which shall be responsible for:

(a) the due administration of the Court; and

(b) the other functions conferred on it by this Statute.

4. Unless otherwise indicated, pre-trial and other procedural functions conferred under this Statute on the Court may be exercised by the Presidency in any case where a chamber of the Court is not seized of the matter.

5. The Presidency may, in accordance with the Rules, delegate to one or more judges the exercise of a power vested in it under articles 26 (3), 27 (5), 28, 29 and 30 (3) in relation to a case, during the period before a Trial Chamber is established for that case.

II. PROPOSALS

FRANCE

Internal organization

1. The college of judges of the Court shall consist of:

(a) a president;

(b) six Vice-Presidents, including a First Vice-President and a Second Vice-President;

(c) seventeen judge counsellors.

2. The President, First Vice-President, Second Vice-President and four other Vice-Presidents shall be elected by an absolute majority at a General Assembly of Judges following their first election. They shall be elected for three years or until expiry of their term as a judge if the term ends before expiry of those three years. They shall be eligible for re-election once.

The General Assembly of Judges of the Court shall be convened when one of the posts referred to in paragraph 1 (a) and (b) of this article falls vacant.

Presidency of the Court

The Presidency of the Court shall be responsible for due administration of the Court. It shall consist of the President, the First Vice-President and the Second Vice-President.

UNITED STATES

1. Add the following to paragraph 1: "The Vice-Presidents and Alternates shall be chosen so as to represent both the appellate and trial judges."

2. Replace paragraph 3 by the following:

> "The President and the Vice-Presidents [Chief and Deputy Chief Judges] shall constitute the Presidency [Administrative Council] which shall be responsible for the due administration of the Court, including the supervision and direction of the Registrar and staff of the Registry and Court. The Presidency [Administrative Council] shall consult with the Prosecutor and include the Prosecutor or Deputy in their meetings on all matters of mutual concern including, for example, functioning of the Registry and security arrangements for defendants, witnesses and the Court."

3. Delete paragraphs 4 and 5.

SINGAPORE

1. Paragraph 2 should be amended as follows:

> "The first Vice-President shall act in place of the President in the event that the President is unavailable or disqualified. The second Vice-President shall act in place of the President in the event that both the President and the first Vice-President are unavailable or disqualified. The President may appoint an alternate Vice-President to act in place of either Vice-President as required."

2. Add the following new paragraph after paragraph 4:

> "4 (bis). Decisions of the Presidency shall be taken [by consensus] [majority vote] of the members. [The President shall have a casting vote in the event of a tie.]"

AUSTRALIA AND NETHERLANDS

Election of the President

As provided for in article X (A 8 ILC), the President shall be elected by an absolute majority of the votes of the judges composing the Court. The procedure for conducting the election shall be laid down in the supplementary rules.

Death, loss of office or resignation of the President

If the President dies, ceases to hold office pursuant to article X (A 15 ILC) or resigns before the expiration of his or her term, the judges shall by absolute majority elect from among their number a successor for the remainder of the term. The election shall be governed by the procedure determined by the judges for the election of the President.

Election of Vice-Presidents and alternate Vice-Presidents

As provided for in article X (A 8 ILC), the Vice-Presidents and alternate Vice-Presidents shall be elected by an absolute majority of the votes and the judges composing the Court. The procedure for conducting these elections shall be laid down in the supplementary rules.

Death, loss of office or resignation of a Vice-President or an alternate Vice-President

If a Vice-President or alternate Vice-President dies, ceases to hold office pursuant to article X (A 15 ILC) or resigns before the expiration of his or her term, the judges shall by absolute majority elect from among their number a successor for the remainder of the term. The election shall be governed by the procedure determined by the judges for the election of Vice-Presidents and alternate Vice-Presidents.

Functions of the Presidency

(a) The Presidency shall exercise the powers and functions conferred upon it by the Statute and these rules.

(b) The procedures to govern the delegation of the powers of the Presidency provided for in article X (A 8(5) ILC) of the Statute shall be laid down in the supplementary rules.

(c) The Presidency shall exercise any powers and functions conferred upon it by the supplementary rules.

The President

(a) The President shall exercise the powers and functions conferred upon him or her by the Statute and these rules.

(b) The President shall exercise any powers and functions conferred upon him or her by the supplementary rules.

The Vice-Presidents

(a) The Vice-Presidents shall exercise the powers and functions conferred upon them by the Statute and these rules.

(b) The Vice-Presidents shall exercise any powers and functions conferred upon them by the supplementary rules.

Replacements

If neither the President nor the Vice-Presidents (or alternate Vice-Presidents when acting as Vice-Presidents) can carry out the functions of the

President, these functions shall be assumed by the senior judge, determined in accordance with the precedence of judges provided for in the supplementary rules.

SWITZERLAND

Delete paragraph 4.

ALGERIA, EGYPT, JORDAN, KUWAIT, LIBYAN ARAB JAMAHIRIYA AND QATAR

As several delegations stated, the "Presidency" should be limited in number and power. In addition to the President, two Vice-Presidents would suffice.

Article 9

Chambers

I. ILC DRAFT

1. As soon as possible after each election of judges to the Court, the Presidency shall in accordance with the Rules constitute an Appeals Chamber consisting of the President and six other judges, of whom at least three shall be judges elected from among the persons nominated as having the qualification referred to in article 6 (1) (b). The President shall preside over the Appeals Chamber.

2. The Appeals Chamber shall be constituted for a term of three years. Members of the Appeals Chamber shall, however, continue to sit on the Chamber in order to complete any case the hearing of which has commenced.

3. Judges may be renewed as members of the Appeals Chamber for a second or subsequent term.

4. Judges not members of the Appeals Chamber shall be available to serve on Trial Chambers and other chambers required by this Statute, and to act as substitute members of the Appeals Chamber in the event that a member of that Chamber is unavailable or disqualified.

5. The Presidency shall nominate in accordance with the Rules five such judges to be members of the Trial Chamber for a given case. A Trial Chamber shall include at least three judges elected from among the persons nominated as having the qualification referred to in article 6 (1) (a).

6. The Rules may provide for alternate judges to be nominated to attend a trial and to act as members of the Trial Chamber in the event that a judge dies or becomes unavailable during the course of the trial.

7. No judge who is a national of a complainant State or of a State of which the accused is a national shall be a member of a chamber dealing with the case.

II. PROPOSALS

FRANCE

Preliminary Investigations Chambers

1. The Preliminary Investigations Chambers perform pre-trial functions, in accordance with Part 4 of this Statute.

2. A Preliminary Investigations Chambers shall be established for each case by the President of the Court. It shall consist of two Vice-Presidents and either the First Vice-President or Second Vice-President, who shall preside over it.

Chambers of the Court

1. The Trial Chamber shall consist of four judge counsellors and a Vice-President, who shall preside over it. The Appeals Chamber shall consist of six judge counsellors and either the First Vice-President or Second Vice-President, who shall preside over it. The Remand Chamber shall consist of four judge counsellors and either the First Vice-President or Second Vice-President, who shall preside over it.

2. All members of the chambers referred to in paragraph 1 of this article shall be chosen by lot. Judges drawn by lot may be excluded as a result of incompatibilities under article ... When the membership of a chamber drawn by lot encounters difficulties owing to incompatibilities under article ..., the First and the Second Vice-President may be replaced by a Vice-President, and a Vice-President by the most senior judge counsellor in the Court or, failing such a judge, the oldest.

3. The President of the Court may, if he so wishes, preside over one of the chambers referred to in paragraph 1 of this article, subject to the provisions of article 13.

Alternate judge counsellors

1. For the membership of each of the chambers referred to in article ..., the President of the Court may arrange for as many alternate judge counsellors as he deems necessary to be chosen by lot. They attend hearings of the chamber for which they have been designated, but do not participate in the deliberations. They are not, in that event, subject to the incompatibilities referred to in article ....

2. In the course of a hearing, an alternate judge counsellor may be required to replace a member of the chamber to which he has been designated, when that member is temporarily unable to perform his duties, either for medical reasons or for one of the reasons set out in articles ... and .... The judge shall be chosen by lot from among the alternate judge counsellors designated for that chamber. Incompatibilities under article ... shall apply to alternate judge counsellors required to sit under the conditions referred to in the preceding paragraph.

Plurality of offices and incompatibilities

For the purposes of ruling on a case, the following functions may not be combined:

...

(b) Serving as a member of the Trial Chamber and as a member of the Appeals Chamber.

JAPAN

1. Replace paragraph 1 by the following:

> "As soon as possible after each election of judges to the Court, the Presidency shall in accordance with the Rules constitute an Appeals Chamber consisting of seven judges, of whom at least three shall be judges elected

from among the persons nominated as having the qualification referred to in article 6(1)(b)."

2. Replace paragraph 4 by the following:

"Judges not members of the Appeals Chamber shall be available to serve on Trial Chambers and Pre-trial Chambers required by this Statute, and to act as substitute members of the Appeals Chamber in the event that a member of that Chamber is unavailable or disqualified."

3. Replace paragraph 5 by the following:

"The Presidency shall nominate in accordance with the rules three such judges to be members of the Pre-trial Chamber for a given case. A Pre-trial Chamber shall include at least two judges elected from among the persons nominated as having the qualification referred to in article 6(1)(a). A Pre-trial Chamber shall be responsible in the given case for such functions as prescribed in [articles 26(3) and (5), 27(2) to (4), 27(5)(b), 28(1) to (3), 30(3), and any other functions concerning pre-trial process].

4. Replace paragraph 6 by the following:

"The Presidency shall nominate in accordance with the rules five such judges who are not members of the Pre-trial Chamber for a given case to be members of the Trial Chamber for the same case. A Trial Chamber shall include at least three judges elected from among the persons nominated as having the qualification referred to in article 6(1)(a)."

5. Add new paragraph 6 bis:

"The rules may provide for alternate judges to be nominated to attend a trial and to act as members of the Pre-trial Chamber and Trial Chamber in the event that a judge dies or becomes unavailable during the course of the trial."

AUSTRALIA AND THE NETHERLANDS

Deliberations

The deliberations of the Chambers shall take place in private and remain secret.

Presiding Judges

(a) If the President is unable to exercise his or her functions as Presiding Judge of the Appeals Chamber under article X (A 9(1) ILC), that Chamber shall elect a Presiding Judge from among its number. The procedure for conducting the election shall be laid down in the supplementary rules.

(b) Where a Vice-President is a member of a Trial Chamber, he or she shall serve as its Presiding Judge. If the Vice-President is unable to exercise his or her functions as Presiding Judge of a Trial Chamber, that Chamber shall elect a Presiding Judge from among its number. The procedure for conducting the election shall be laid down in the supplementary rules.

Plenary sessions of the Court

The Judges shall meet in plenary to:

(i) elect the President, the Vice-Presidents and alternate Vice-Presidents;

(ii) elect the Registrar and Deputy Registrar;

(iii) adopt and amend the supplementary rules;

(iv) decide upon matters relating to the internal functioning of the Chambers and the Court;

(v) adopt the annual report provided for in article X of the Statute; and

(vi) exercise any other functions provided for in the Statute, the rules or the supplementary rules or as necessitated by the operation of the Court.

Timing and conduct of plenary sessions

The timing and the conduct of plenary sessions shall be governed by the supplementary rules.

[Note. The provisions under the previous two hearings may be more appropriately included as a separate article headed "plenary sessions".]

Article 9, paragraph 1

UNITED KINGDOM

Replace the word "six" by the word "four" and delete the words "of whom at least three shall be judges elected from among the persons nominated as having the qualification referred to in article 6(1)(b)" in the first sentence.

SWITZERLAND

Replace the first sentence in paragraph 1 by the following:

"As soon as possible after each election of judges to the Court, the Presidency shall, in accordance with the rules, constitute an Appeals Chamber consisting of the President and two other judges."

AUSTRIA

The first sentence in paragraph 1 is amended as follows: "As soon as possible ... the Presidency shall in accordance with the rules constitute an Indictment Chamber consisting of three judges and an Appeals Chamber ..."

SINGAPORE

Replace paragraph 1 by the following:

"As soon as possible after each election of judges to the Court, an Appeals Chamber shall be constituted consisting of the President and six other judges to be elected by an absolute majority of the judges of the Court. Of these six other judges, [at least three] shall be judges elected from among the persons nominated as having the qualification referred to in article 6(1)(a) and [at least three] shall be judges elected from among the persons nominated as having the qualification referred to in article 6(1)(b). The President shall preside over the Appeals Chamber."

Article 9, paragraph 2

AUSTRIA

Paragraph 2 is amended as follows:

"The Indictment Chamber and the Appeals Chamber shall ... Members of the Indictment Chamber and the Appeals Chamber ..."

UNITED KINGDOM

Paragraph 2 is replaced by the following:

"Judges who have served in the Appeals Chamber shall not serve in any other Chamber and judges who have served in a Trial Chamber shall not serve in the Appeals Chamber."

Article 9, paragraph 3

UNITED KINGDOM

Delete paragraph 3.

Article 9, paragraph 4

AUSTRIA

Add the following second sentence in paragraph 4: "Judges of the Indictment Chamber shall not serve in the Trial Chambers or in the Appeals Chamber at the same time."

ALGERIA, EGYPT, JORDAN, KUWAIT, LIBYAN ARAB JAMAHIRIYA
AND QATAR

The proposed practice of rotation of judges between the appellate and Trial Chambers is incompatible with basic principles of judicial independence, impartiality and fairness. Reviewing judges must therefore, remain in that position and not rotate to trial functions.

It is also useful to consider a general practice of limited rotation and specialization. This would apply, for example, to the Chamber on Indictments and preliminary matters. This proposed Chamber, which would consist of three judges and one alternate judge, would be assigned for a period of a number of years. This would provide for specialization, and also for consistency and predictability of outcomes.

Article 9, paragraph 5

SWITZERLAND

Replace paragraph 5 by the following:

> "The Presidency shall nominate, in accordance with the rules and for a period of three years, two Trial Chambers consisting of three judges each. The members of the Trial Chambers shall continue to sit in order to complete any case the hearing of which has commenced."

SINGAPORE

Paragraph 5 is amended as follows:

> "The Presidency shall nominate on a rotational basis as far as possible and in accordance with the Rules ..."

UNITED KINGDOM

Replace the word "five" by the word "three" and delete the second sentence in paragraph 5.

ALGERIA, EGYPT, JORDAN, KUWAIT, LIBYAN ARAB JAMAHIRIYA
AND QATAR

In order to provide for greater stability in the Chambers and to avoid frequent rotations resulting in conflicts that would reduce the number of available judges who would be conflicted out of carrying out judicial functions in certain cases, assignment of judges to specific trial chambers should be for a certain number of years. Every chamber should consist of three judges, and should have one alternate judge to sit if one of the judges becomes unavailable to continue in his or her function.

Article 9, paragraph 6

SWITZERLAND

Replace paragraph 6 by the following:

> "Rules may provide for alternate judges to be nominated to act as members of the Trial or Indictment Chambers and the Appeals Chamber in the event of death or unavailability of a judge."

ARGENTINA

For the cases of illness or other incapacity, death, loss of office or resignation of a member of the Trial Chamber, the following formula is proposed:

"If a judge sitting as a member of the Trial Chamber is unable to continue sitting in a part-heard trial owing to illness or other incapacity, the Presiding Judge may adjourn the proceedings, if the cause of that inability seems likely to be of short duration. Otherwise, or if the cause of the inability is still present 10 days after the adjournment, the Presiding Judge shall report to the Presidency, which shall order a retrial. If the Trial Chamber has comprised more than the required number of judges from the start of the trial, the judge in question shall be replaced immediately by an alternate judge. This rule shall also apply to cases of death, loss of office or resignation of a judge from the Trial Chamber."

[Note. Only a judge who has been present without interruption throughout the trial is in a position to pass judgement in a case. Alternative measures, such as audio and video recordings, cannot substitute for the judge's direct sensory perception of what takes place in the courtroom, and therefore do not constitute justifiable exceptions to the principle in question. In appellate proceedings, on the other hand, the principle of immediacy is much more limited in scope, since, as a rule, the Appeals Chamber bases its decision on the trial record. The rules applicable in the case of death, incapacity or other impediment of a member of the Appeals Chamber have not therefore been amended.]

Article 9, paragraph 7

UNITED STATES

Delete paragraph 7.

Article 10

Independence of the judges

I. ILC DRAFT

1. In performing their functions, the judges shall be independent.

2. Judges shall not engage in any activity which is likely to interfere with their judicial functions or to affect confidence in their independence. In particular they shall not while holding the office of judge be a member of the legislative or executive branches of the Government of a State, or of a body responsible for the investigation or prosecution of crimes.

3. Any question as to the application of paragraph 2 shall be decided by the Presidency.

4. On the recommendation of the Presidency, the States parties may by a two-thirds majority decide that the workload of the Court requires that the judges should serve on a full-time basis. In that case:

(a) existing judges who elect to serve on a full-time basis shall not hold any other office or employment; and

(b) judges subsequently elected shall not hold any other office or employment.

II. PROPOSALS

FRANCE

1. The judges of the Court shall be independent. They may not engage in any activity which is likely to be incompatible with their judicial functions or to affect confidence in their independence. They may not, moreover, be a member of the legislative or executive branches of the Government of a State or a body responsible for the investigation or prosecution of crimes.

2. Judges who are required to serve permanently on the Court, pursuant to article 5(2) or (3), may not engage in any other employment or hold any other office.

3. When the Presidency considers that the Court's case load requires the permanent presence of all the judges of the Court, it shall so inform the General Assembly of the States Parties, which may decide that all judges shall perform their duties full-time, for a period determined by the General Assembly or until further notice.

SINGAPORE

Paragraph 3 is amended as follows:

"Any question as to the application of paragraph 2 shall be decided by an absolute majority of the judges of the Court."

UNITED STATES

In subparagraphs 4(a) and (b) insert the words "full time" before the words "office or employment".

ISRAEL

Replace paragraph 2 by the following:

"Judges should be prohibited from exercising any political or administrative function or engaging in any other occupation of a professional nature".

Article 11

Excusing and disqualification of judges

I. ILC DRAFT

1. The Presidency at the request of a judge may excuse that judge from the exercise of a function under this Statute.

2. Judges shall not participate in any case in which they have previously been involved in any capacity or in which their impartiality might reasonably be doubted on any ground, including an actual, apparent or potential conflict of interest.

3. The Prosecutor or the accused may request the disqualification of a judge under paragraph 2.

4. Any question as to the disqualification of a judge shall be decided by an absolute majority of the members of the Chamber concerned. The challenged judge shall not take part in the decision.

II. PROPOSALS

FRANCE

1. A judge of the Court shall not participate in a case:

(a) in the event of one of the incompatibilities under article ...;

(b) when his impartiality may be doubted on any ground, including an actual, apparent or potential conflict of interest.

2. In situations provided for in paragraph 1 of this article, a judge may:

(a) be excused from a case by the Presidency, with his agreement;

(b) be disqualified, at the request of the Presidency, the Prosecutor or the accused, in which case the decision shall be taken by the Appeals Chamber, and the judge concerned shall not be present if he forms part of that Chamber; he shall then be replaced by another judge chosen by lot.

3. For the purposes of ruling on a case, the following functions may not be combined:

(a) serving as a member of the Preliminary Investigations Chamber appointed for a case under article 10 and as a member of one of the chambers hearing the same case;

(b) serving as a member of the Trial Chamber and as a member of the Appeals Chamber.

JAPAN

1. Replace paragraph 2 by the following:

"In the following cases a judge shall be excluded from the exercise of his functions under this Statute:

(a) if he himself is the injured party;

(b) if he is or was a relative of the accused or the injured party;

(c) if he is a national of a complainant State or of a State of which the accused is a national;

(d) if he is the legal representative, supervisor of the guardian or curator of the accused or the injured party;

(e) if he has acted as a witness or an expert witness in the case involving the accused or the injured party;

(f) if he has acted as the representative, counsel or assistant of the accused in the case involving that accused;

(g) if he has exercised the functions of a public prosecutor or a judicial officer in the case involving the accused;

(h) if he has previously exercised the functions of a judge in the case involving the accused at the national level; or

(i) if he has participated in the decision mentioned in article 8 or 37 (4), in the decision by the Court below, in the original judgment of the case which has been sent back in accordance with the provisions of article 50 or in the investigations which form the basis of such decisions."

2. Add new paragraph 5 as follows:

"Procedures of the trial subsequent to the change of the judges in accordance with this article shall be prescribed by the rules."

ARGENTINA

1. No member of the Presidency who has participated in a decision by the Presidency under articles 26(3), 27(5), 28, 29 or 30(3) of the Statute concerning the case being tried or under appeal may sit as a member of the Trial or Appeals Chamber in that case. No judge who has made a decision under articles 26(3), 27(5), 28, 29 or 30(3) of the Statute concerning the case being tried or under appeal pursuant to a delegation from the Presidency under article 8(5) of the Statute may sit as a member of the Trial or Appeals Chamber in that case.

2. A member of the Presidency who participated in the confirmation of the indictment against a suspect under article 27(2) of the Statute may not subsequently sit as a member of the Trial Chamber for the trial of that accused or as a member of the Appeals Chamber hearing an appeal in relation to that trial.

3. If a judge is disqualified from continuing to sit in a part-heard trial and thereby deprives the Trial Chamber of its required quorum under article 45(1) of the Statute, he or she shall be replaced immediately by an alternate judge if the Trial Chamber has from the start of the trial comprised more than the required number of judges. Otherwise, the Presidency shall order a retrial.

[Note. This proposal is based on a strict interpretation of the principle of impartiality; it is felt that a judge who has sat previously in the same case, even if he or she has not played a decisive role, runs the risk of being subjected to influences which may prevent him or her from making an impartial decision. It is therefore preferable to establish an explicit rule, in line with part of the jurisprudence of the European Court of Human Rights in the cases of Piersack v. Belgium (1982) and De Cubber v. Belgium (1984) which prohibits the subsequent participation of the judge in the decision of the case and thereby avoiding an interminable discussion of the potential effect of the specific action taken by the judge in question.]

AUSTRIA

In paragraph 2, after the word "Judges" add the words "except the members of the Indictment Chamber having acted in this capacity,".

ISRAEL

Add new paragraph 3(bis) as follows:

"3 (bis). Any request for the disqualification of a judge should include detailed reasons for the request."

AUSTRALIA AND NETHERLANDS

Disqualification

(a) A member of the Presidency shall not be subject to disqualification from a trial or appeal because he or she participated in a decision by the Presidency under articles **X** (A 26(3), 27(5), 28, 29, 30(3) ILC) of the Statute concerning the case being tried or under appeal. A judge shall not be subject to disqualification from a trial or appeal who has made a decision under articles **X** (A 26(3), 27(5), 28, 29, 30(3) ILC) of the Statute concerning the case being tried or under appeal pursuant to a delegation from the Presidency under article X (A 8(5) ILC) of the Statute.

(b) A member of the Presidency, who participated in the confirmation of the indictment against an accused under article **X** (A 27(2) ILC) of the Statute may sit as a member of the Trial Chamber for the trial of that accused or as a member of the Appeals Chamber hearing an appeal in relation to that trial.

(c) No member of the Appeals Chamber shall sit on any appeal in a case in which he or she sat as a member of the Trial Chamber.

(d) As provided for in article **X** (A 37(5) ILC) of the Statute, any judge who was a member of an Indictment Chamber may not subsequently sit as a member of a Trial Chamber hearing the case against the accused who was the subject of the proceedings before the Indictment Chamber.

(e) If a judge is disqualified from continuing to sit in a part-heard trial and thereby deprives the Trial Chamber of its required quorum under article **X** (A 45(1) ILC) of the Statute, the Presidency may assign another judge to the Chamber and order either a rehearing or continuation of the proceedings from that point. However, after the beginning of the presentation of evidence, the continuation of the proceedings may only be ordered with the consent of the accused.

(f) If a judge is disqualified from continuing to sit in a part-heard appeal and thereby deprives the Appeals Chamber of its required quorum under article **X** (A 49(4) ILC) of the Statute, the Presidency may assign another judge to the Chamber drawn, subject to sub-rule (C) of this rule, from those available for duty in a Trial Chamber.

Assignment of judges

The Assignment of judges shall be governed by the procedure laid down in the supplementary rules.

Conflict of interest

(a) In order to assist the application of article X (A 11(2) ILC) of the Statute, the supplementary rules shall contain detailed conflict of interest rules.

(b) States Parties shall be able to make submissions to the President about the content of these rules.

Article 12

The Procuracy

I. ILC DRAFT

1. The Procuracy is an independent organ of the Court responsible for the investigation of complaints brought in accordance with this Statute and for the conduct of prosecutions. A member of the Procuracy shall not seek or act on instructions from any external source.

2. The Procuracy shall be headed by the Prosecutor, assisted by one or more Deputy Prosecutors, who may act in place of the Prosecutor in the event that the Prosecutor is unavailable. The Prosecutor and the Deputy Prosecutors shall be of different nationalities. The Prosecutor may appoint such other qualified staff as may be required.

3. The Prosecutor and Deputy Prosecutors shall be persons of high moral character and have high competence and experience in the prosecution of criminal cases. They shall be elected by secret ballot by an absolute majority of the States parties, from among candidates nominated by States parties. Unless a shorter term is otherwise decided on at the time of their election, they shall hold office for a term of five years and are eligible for re-election.

4. The States parties may elect the Prosecutor and Deputy Prosecutors on the basis that they are willing to serve as required.

5. The Prosecutor and Deputy Prosecutors shall not act in relation to a complaint involving a person of their own nationality.

6. The Presidency may excuse the Prosecutor or a Deputy Prosecutor at their request from acting in a particular case, and shall decide any question raised in a particular case as to the disqualification of the Prosecutor or a Deputy Prosecutor.

7. The staff of the Procuracy shall be subject to Staff Regulations drawn up by the Prosecutor.

II. PROPOSALS

FRANCE

Procuracy of the Court

1. The Procuracy shall be an independent organ of the Court responsible under this Statute for receiving complaints addressed to the Court, for examining them and for conducting investigations and prosecutions before the Court.

2. The Procuracy shall be headed by the Prosecutor, assisted by two Deputy Prosecutors. The Procuracy is an indivisible body; the Deputy Prosecutors are entitled to carry out any of the acts required of the Prosecutor under this Statute.

3. The Prosecutor and the Deputy Prosecutors shall be persons of high moral character, possess great competence and have practical experience in the prosecution of criminal cases. They shall, furthermore, have an excellent knowledge of and be fluent in at least one of the working languages referred to in article 25.

4. Each State Party may nominate two persons who are willing to serve as may be required in the Procuracy of the Court.

5. The Prosecutor and Deputy Prosecutors shall be elected by the General Assembly of the States Parties. The election of the Prosecutor shall be held first, followed by that of the two Deputy Prosecutors. No two members of the Procuracy of the Court may be of the same nationality.

6. The Prosecutor and Deputy Prosecutors shall hold office for nine years. The term shall end in all cases when the person reaches 70 years of age. They shall not be eligible for re-election.

7. The Prosecutor or a Deputy Prosecutor may not participate in a case in which his impartiality might be doubted on any ground, including an actual, apparent or potential conflict of interest. The Presidency of the Court may on its own motion or at the request of the Prosecutor or of a suspect or accused person, excuse a member of the Procuracy from following a case for one of the reasons set out in the preceding paragraph.

Investigators

The Prosecutor may choose investigators who shall assist him in his duties and shall be placed under his sole authority. They may carry out any acts for which they have been delegated by the Prosecutor or a Deputy Prosecutor, with the exception of requests for cooperation referred to in Part 4 of this Statute. They shall be staff members of the Court within the meaning of this Statute.

Article 31 of the ILC draft Statute should be placed in Part 2 of the Statute with the following amendments:

(a) The Prosecutor may request a State Party to make persons available to him to assist him in a particular case;

(b) Such persons shall be under the authority of the Prosecutor for the duration of the case for which they have been made available. They may carry out acts under the conditions established for investigators in article ...

JAPAN

1. Replace paragraph 5 by the following:

> "The Prosecutor and Deputy Prosecutors shall not act in relation to a complaint falling in the following cases:
>
> (a) if they themselves are the injured party;
>
> (b) if they are or were a relative of the accused or the injured party;

(c) if they are a national of a complainant State or of a State of which the accused is a national;

(d) if they are the legal representative, supervisor of the guardian or curator of the accused or the injured party;

(e) if they have acted as a witness or an expert witness in the case involving the accused or the injured party; or

(f) if they have acted as the representative, counsel or assistant of the accused in the case involving that accused."

2. Replace paragraph 6 by the following:

> "In case the Prosecutor or a Deputy Prosecutor falls in the cases prescribed in the preceding paragraph, he may be challenged by the accused. The Presidency shall decide on challenges against the Prosecutor or a Deputy Prosecutor made before the first day of the public trial. Challenges made afterwards shall be decided by the Trial Chamber concerned."

UNITED KINGDOM

1. In the first sentence of paragraph 3 after the words "moral character" add the words ", impartiality and integrity in" and replace the words "high competence and experience" by the words "the highest level of competence and experience in the investigation and".

2. Replace the second sentence of paragraph 3 by the following:

> "They should be elected by secret ballot by an absolute majority of the [States Parties, from among candidates nominated by the members of the Court] [members of the Court, from among candidates nominated by the States Parties]."

SINGAPORE

1. The third sentence of paragraph 3 is amended as follows: "Unless a shorter term ... they shall hold office for a term of [seven/nine] years and are not eligible for re-election."

2. After paragraph 4 add the following paragraph:

> "4 bis. The Prosecutor and Deputy Prosecutors shall not engage in any activity which is likely to interfere with their prosecutorial functions or to affect confidence in their independence. In particular they shall not, while holding office, be a member of the legislative or executive branches of the Government of a State [, or of a body responsible for the investigation or prosecution of crimes]."

3. Paragraph 5 is amended as follows:

> "The Prosecutor and Deputy Prosecutors shall not act in relation to a complaint initiated by their State of nationality or involving a person of

their own nationality or in any case in which they have previously been involved in any capacity."

FINLAND

Add the following sentence at the end of paragraph 5:

"They shall not participate in any case in which they are or have previously been involved in any capacity or in which their impartiality might reasonably be doubted on any ground, including an actual, apparent or potential conflict of interest."

DENMARK, FINLAND, MALAWI, NEW ZEALAND, NIGERIA,
NORWAY AND SWEDEN

Add a new paragraph 8 as follows:

"The paramount consideration in the employment of the staff of the Procuracy and in the drawing up of the staff regulations shall be the necessity of securing the highest standards of efficiency, competence and integrity. In the employment of the staff the Prosecutor should bear in mind the criteria set forth in article [6(5)] (as amended)."

AUSTRALIA AND NETHERLANDS

Powers and functions of the Prosecutor

(a) The Prosecutor shall exercise the powers and functions conferred upon him or her by the Statute and these rules.

(b) The Prosecutor shall be responsible for the organization and administration of the Procuracy.

(c) The Prosecutor may put in place such internal procedures as he or she considers necessary to govern the operation of the Procuracy.

(d) The Prosecutor's powers under the rules may be exercised by staff members of the Procuracy authorized by him or her, or by any person acting under his or her direction.

Role of a Deputy Prosecutor

(a) A Deputy Prosecutor shall assist the Prosecutor, act as Prosecutor in the latter's absence and, in the event of the office becoming vacant, exercise the functions of Prosecutor until the office has been filled.

(b) If States parties elect more than one Deputy Prosecutor under article **X** (A 12(3) ILC), the Prosecutor shall establish a mechanism for determining which Deputy Prosecutor is to act as Prosecutor in his or her absence and, in the event of the office becoming vacant, exercise the functions of Prosecutor until the office has been filled by election under article **X** (A 12(3) ILC) of the Statute.

Acting Prosecutor

(a) If both the Prosecutor and Deputy Prosecutor(s) are unable to carry out the duties of the Prosecutor on a temporary basis, an acting Prosecutor shall discharge those duties for such time as may be necessary. The acting Prosecutor shall be appointed from a list of other lawyers serving as prosecutors on the staff of the Procuracy, which shall be compiled by the Prosecutor. The list shall prescribe the order in which the persons identified therein are to be called upon to serve as acting Prosecutor.

(b) If the offices of Prosecutor and Deputy Prosecutor(s) are vacant at the same time, an acting Prosecutor shall discharge the duties of Prosecutor pending an election to that office under article **X** (A 12(3) ILC) of the Statute. The acting Prosecutor shall be appointed from the list referred to in sub-rule (a). He or she shall be subject to the provisions of the Statute governing the loss of office by the Prosecutor.

Solemn undertaking

(a) Upon commencing employment, every staff member of the Procuracy shall make the same undertaking as required of judges and other officers of the Court.

(b) The undertaking, signed by the staff member and witnessed by the Prosecutor or a Deputy Prosecutor, shall be kept in the records of the Court.

Retention of information and evidence

The Prosecutor shall be responsible for the retention, storage and security of information and physical evidence obtained in the course of the Procuracy's investigations.

Agreements with States

The Prosecutor may enter into agreements with States governing the provision of resources by States to assist in investigations and prosecutions, including the use of national scientific analysis or forensic facilities and the secondment of persons to the staff of the Prosecutor, as provided for in article **X** (A 31 ILC) of the Statute.

Conflict of interest

(a) In order to assist the application of article **X** (A 12(6) ILC) of the Statute, the Prosecutor shall put in place a set of detailed conflict of interest rules for the staff of the Procuracy.

(b) States Parties shall be able to make submissions to the Prosecutor about the content of these rules.

Article 13

The Registry

I. ILC DRAFT

1. On the proposal of the Presidency, the judges by an absolute majority by secret ballot shall elect a Registrar, who shall be the principal administrative officer of the Court. They may in the same manner elect a Deputy Registrar.

2. The Registrar shall hold office for a term of five years, is eligible for re-election and shall be available on a full-time basis. The Deputy Registrar shall hold office for a term of five years or such shorter term as may be decided on, and may be elected on the basis that the Deputy Registrar is willing to serve as required.

3. The Presidency may appoint or authorize the Registrar to appoint such other staff of the Registry as may be necessary.

4. The staff of the Registry shall be subject to Staff Regulations drawn up by the Registrar.

II. PROPOSALS

FRANCE

1. The General Assembly of judges shall elect the Registrar and the Deputy Registrar of the Court by an absolute majority by secret ballot. The Registrar and the Deputy Registrar shall hold office for five years. Their term shall end in all cases when they reach 65 years of age. They shall be eligible for re-election once.

2. The Registrar shall be the principal administrative officer of the Court. He shall be under the authority of the President of the Court.

JAPAN

Add the following new paragraph before paragraph 1 of the ILC draft statute:

> "1 (bis). The Registry shall be responsible for the administration and serving of the Court."

SINGAPORE

The second sentence in paragraph 2 is amended as follows:

"The Deputy Registrar shall hold for a term of five years or such shorter term as may be decided on [by the judges by consensus/by an absolute majority of the judges], and may be elected on the basis that the Deputy Registrar is willing to serve as required."

UNITED STATES

1. Add a second sentence in paragraph 4 as follows:

"Such regulations shall be circulated to the States parties for comment, whenever possible before they take effect."

2. Add a new paragraph 5 as follows:

"The Registry may be removed by a majority vote of the judges for inadequate performance, malfeasance or other good cause."

AUSTRALIA AND NETHERLANDS

Composition of the Registry

The Registry shall comprise the Registrar, the Deputy Registrar (if one has been elected) and such other staff appointed by the Registrar pursuant to article **X** (A 13 (3) ILC) of the Statute.

Qualifications of the Registrar

The Presidency shall satisfy itself that the candidates it puts forward for the consideration of judges in the ballot for the position of Registrar are of the highest calibre.

Election of the Registrar

As provided for in article **X** (A 13 (1) ILC) of the Statute, the judges shall elect the Registrar by an absolute majority by secret ballot. The necessary procedure for conducting the election shall be laid down in the supplementary rules.

Death, loss of office or resignation of the Registrar

If the Registrar dies, ceases to hold office pursuant to article **X** (A 15 ILC) of the Statute or resigns before the expiration of his or her term, the judges shall by an absolute majority by secret ballot elect a replacement. The election shall be governed by the procedure determined by the judges.

Qualifications of the Deputy Registrar

The Presidency shall satisfy itself that the candidates it puts forward for the consideration of judges in the ballot for the position of Deputy Registrar are of the highest calibre.

Election of the Deputy Registrar

As provided for in article **X** (A 13 (1) ILC) of the Statute, the judges shall elect the Deputy Registrar by an absolute majority by secret ballot. The election shall be governed by the procedure determined by the judges for the election of the Registrar.

Death, loss of office or resignation of the Deputy Registrar

If the Deputy Registrar dies, ceases to hold office pursuant to article **X** (A 15 ILC) of the Statute or resigns before the expiration of his or her term, the judges shall by an absolute majority by secret ballot elect a replacement. The election shall be governed by the procedure determined by the judges.

Solemn undertaking

(a) Upon commencing employment, every staff member of the Registry shall make the same undertaking as required of judges and other officers of the Court.

(b) The undertaking, signed by the staff member and witnessed by the Registrar or Deputy Registrar, shall be kept in the records of the Court.

Functions of the Registrar

(a) The Registrar is charged with being the principal administrative officer of the Court by article **X** (A 13 (1) ILC) of the Statute. Accordingly, under the authority of the Presidency, he or she shall be responsible for organizing the Registry and for the administration and servicing of the Court and shall serve as its channel of communication, in accordance with the Statute, rules and supplementary rules of the Court. The Registrar shall assist the Chambers, the plenary meetings of the Court, the judges and the Prosecutor in the performance of their functions.

(b) The Registrar shall also be responsible for the security of the Court in consultation with other organs of the Court and the host State.

(c) The duties of the Registrar shall be elaborated in the supplementary rules.

Role of the Deputy Registrar

(a) The Deputy Registrar shall assist the Registrar, act as Registrar in the latter's absence and, in the event of the office becoming vacant, exercise the functions of Registrar until the office has been filled by election.

(b) The duties of the Deputy Registrar shall be elaborated in the supplementary rules.

Official of the Registry to serve as Registrar

(a) If both the Registrar and the Deputy Registrar are unable to carry out the duties of the Registrar on a temporary basis, the Presidency shall appoint an official of the Registry to discharge those duties for such time as may be necessary.

(b) If both offices are vacant at the same time, the Presidency, after consulting the other judges, shall appoint an official of the Registry to discharge the duties of the Registrar pending an election to that office. The official shall be subject to the provisions of the Statute, rules and supplementary rules governing the loss of office by the Registrar.

Records

(a) The Registrar shall maintain records which shall list all the particulars of each case brought before the Court. The records shall be open to the public.

(b) The Registrar shall also maintain the other records of the Court.

[Note. The issue of whether some records may need to be sealed should be addressed.]

Minutes

Except where a full record is made, the Registrar, or Registry staff designated by him or her, shall take minutes of the plenary meetings of the Court and of the sittings of the Chambers, other than private deliberations.

Victims and Witnesses Unit

(a) There shall be set up under the authority of the Registrar a Victims and Witnesses Unit consisting of qualified staff to:

(i) recommend protective measures for victims and witnesses in accordance with article **X** (A 43 ILC) of the Statute; and

(ii) provide counselling and support for them, in particular in cases of rape and sexual assault.

(b) Due consideration shall be given, in the appointment of staff, to the employment of qualified women.

Article 14

Solemn undertaking

I. ILC DRAFT

Before first exercising their functions under this Statute, judges and other officers of the Court shall make a public and solemn undertaking to do so impartially and conscientiously.

II. PROPOSALS

FRANCE

1. Before taking office pursuant to this Statute, all officers of the Court shall make a public and solemn undertaking to perform their duties impartially and conscientiously.

2. In performing their duties, the officers of the Court and the staff of the Court shall not seek or accept instructions from any Government or any authority outside the Court. They shall refrain from any act incompatible with their status and shall be accountable only to the Court.

3. The States Parties undertake to respect the exclusive international character of the duties of the officers of the Court and the staff of the Court and not to seek to influence them in the performance of their duties.

AUSTRALIA AND NETHERLANDS

Solemn undertaking

(a) As required by article **X** (A 14 ILC) of the Statute, before first exercising their functions under the Statute, judges and other officers of the Court shall make the following solemn undertaking:

> "I solemnly undertake that I will perform my duties and exercise my powers as **X** of the International Criminal Court honourably, faithfully, impartially and conscientiously and that I will respect the provisions of the Statute, rules and supplementary rules of the Court."

(b) The undertaking, signed by the judge or other officer of the Court and witnessed by **X** or his or her representative, shall be kept in the records of the Court.

[Note. Specific proposals for the solemn undertaking to be made by staff members of the Prosecutor's Office and the Registry are contained in the proposals under articles 12 and 13 respectively.]

Article 15

Loss of office

I. ILC DRAFT

1. A judge, the Prosecutor or other officer of the Court who is found to have committed misconduct or a serious breach of this Statute, or to be unable to exercise the functions required by this Statute because of long-term illness or disability, shall cease to hold office.

2. A decision as to the loss of office under paragraph 1 shall be made by secret ballot:

(a) in the case of the Prosecutor or a Deputy Prosecutor, by an absolute majority of the States Parties;

(b) in any other case, by a two-thirds majority of the judges.

3. The judge, the Prosecutor or any other officer whose conduct or fitness for office is impugned shall have full opportunity to present evidence and to make submissions but shall not otherwise participate in the discussion of the question.

II. PROPOSALS

FRANCE

1. An officer of the Court who has seriously breached the rules laid down in this Statute or has committed misconduct such as to jeopardize his independence or his impartiality, or is unable to continue to perform his duties for medical reasons duly established by at least two experts, shall be dismissed under the conditions laid down in paragraph 2 of this article.

2. The decision to dismiss an officer of the Court under the preceding paragraph shall be taken, further to an assenting opinion of the General Assembly of Judges of the Court, by the General Assembly of States Parties.

3. An officer of the Court whose activity is challenged under this article may in defence produce any arguments and evidence that he deems necessary. All evidence against him shall be communicated to him.

JAPAN

Discipline and loss of office

1. A judge, the Prosecutor or a Deputy Prosecutor shall not be removed against his will except by procedures in this article unless judicially declared mentally or physically incompetent to perform his official duties.

2. A judge can be removed by a two-thirds majority of the States Parties upon request by either more than three judges or more than one tenth of the States Parties, if that judge falls in either of the following cases:

(a) if he/she has committed grave misconduct in performing his/her functions, or a serious breach of his/her official duties; or

(b) if he/she has been engaged in delinquency, whether officially or privately, which raises serious doubts in public confidence in his/her capacity as a judge.

3. A judge who has committed misconduct other than those mentioned in the preceding paragraph shall be subject to disciplinary measures as decided by a two-thirds majority of the judges excluding himself/herself.

4. The Prosecutor or a Deputy Prosecutor can be removed by a majority of the States Parties upon request by either the Presidency or more than one tenth of the States Parties, if he/she falls in either of the following cases:

(a) if he/she has committed grave misconduct in performing his/her functions, or a serious breach of his/her official duties; or

(b) if he/she has been engaged in delinquency, whether officially or privately, which raises serious doubts in public confidence in his/her official capacity.

5. The Prosecutor or a Deputy Prosecutor who has committed misconduct other than those mentioned in the preceding paragraph shall be subject to such disciplinary measures as decided by ...

6. Discipline including loss of office against other staff of the Court shall be governed by the rules and the staff regulations.

7. The third paragraph of article 15 of the ILC draft statute should be retained and renumbered as paragraph 7 in this proposal.

AUSTRALIA AND NETHERLANDS

Illness or other incapacity

(a) If a judge is, for reason of illness or other incapacity, unable to continue sitting in a part-heard trial, and thereby deprives a Trial Chamber of its required quorum under article **X** (A 45 (1) ILC) of the Statute, the Presiding Judge may, if that inability seems likely to be of short duration, adjourn the proceedings. Otherwise he or she shall report to the Presidency which may assign another judge to the Chamber and order either a rehearing or continuation of the proceedings from that point. However, after the beginning of the presentation of evidence, the continuation of the proceedings may only be ordered with the consent of the accused.

(b) If a judge is, for reason of illness or other incapacity, unable to continue sitting in a part-heard appeal, and thereby deprives the Appeals Chamber of its required quorum under article **X** (A 49 (4) ILC) of the Statute, the Presiding Judge may, if that inability seems likely to be of short duration, adjourn the proceedings. Otherwise, he or she shall report to the Presidency which may assign a Judge to the Chamber, drawn from those available for duty in a Trial Chamber.

Death

(a) If the death of a judge deprives a Trial Chamber of its required quorum under article **X** (A 45 (1) ILC) of the Statute, the Presidency may assign another Judge to the Chamber and order either a rehearing or continuation of the proceedings from that point. However, after the beginning of the presentation of evidence, the continuation of the proceedings may only be ordered with the consent of the accused.

(b) If the death of the judge deprives the Appeals Chamber of its required quorum under article **X** (A 49 (4) ILC) of the Statute, the Presidency may assign another Judge to the Chamber, drawn from those available for duty in a Trial Chamber.

Loss of office

(a) If a judge ceases to hold office pursuant to the application of article **X** (A 15 ILC) of the Statute during a part-heard trial and thereby deprives a Trial Chamber of its required quorum under article **X** (A 45 (1) ILC) of the Statute, the Presidency may assign another judge to the Chamber and order either a rehearing or continuation of the proceedings from that point. However, after the beginning of the presentation of evidence, the continuation of the proceedings may only be ordered with the consent of the accused.

(b) If a judge ceases to hold office pursuant to the application of article **X** (A 15 ILC) of the Statute, and thereby deprives the Appeals Chamber of its required quorum under article **X** (A 49 (4) ILC) of the Statute, the Presidency may assign another judge to the Chamber, drawn from those available for duty in a Trial Chamber.

Resignation

(a) A judge who wishes to resign shall communicate that decision in writing to the President who shall transmit it to **X**. The judge shall endeavour to discharge his or her responsibilities in relation to uncompleted trials or appeals before the resignation takes effect.

(b) Where the resignation of a judge takes effect during a part-heard trial and thereby deprives the Chamber of its required quorum under article **X** (A 45 (1) ILC) of the Statute, the Presidency may assign another judge to the Chamber and order either a rehearing or continuation of the proceedings from that point. However, after the beginning of the presentation of the evidence, the continuation of the proceedings may only be ordered with the consent of the accused.

(c) Where the resignation of a judge takes effect during a part-heard appeal and thereby deprives the Chamber of its required quorum under article **X** (A 49 (4) ILC) of the Statute, the Presidency may assign another judge to the Chamber drawn from those available for duty in a Trial Chamber.

The judges

(a) In any case in which the application of article **X** (A 15 ILC) to a judge is under consideration, the judge concerned shall be so informed by the President in a written statement which shall include the grounds therefor and any relevant evidence. He or she shall subsequently, in a close plenary session of the Court specially convened for the purpose, be afforded full opportunity, in accordance with article **X** (A 15 (4) ILC) of the Statute, to present evidence and make submissions. He or she shall also have full opportunity to supply answers, orally or in writing, to any questions put to him or her.

(b) At a further closed plenary session of the Court specially convened for the purpose, the question of whether the judge concerned should continue to hold office shall be put to a vote in accordance with article **X** (A 15 (2) ILC) of the Statute. The procedure for conducting the vote shall be laid down in the supplementary rules.

The Registrar and Deputy Registrar

(a) In any case in which the application of article **X** (A 15 ILC) of the Statute to the Registrar or Deputy Registrar is under consideration, the Registrar or Deputy Registrar shall be so informed by the President in a written statement which shall include the grounds therefor and any relevant evidence. He or she shall subsequently, in a closed plenary session of the Court specially convened for the purpose, be afforded full opportunity, in accordance with article **X** (A 14 (4) ILC) of the Statute, to present evidence and make submissions. He or she shall also have full opportunity to supply answers, orally or in writing, to any question put to him or her.

(b) At a further closed plenary session of the Court specially convened for the purpose, the question of whether the Registrar or Deputy Registrar should continue to hold office shall be put to a vote in accordance with article **X** (A 15 (2) ILC) of the Statute. The procedure for conducting the vote shall be laid down in the supplementary rules.

Article 16

Privileges and immunities

I. ILC DRAFT

1. The judges, the Prosecutor, the Deputy Prosecutors and the staff of the Procuracy, the Registrar and the Deputy Registrar shall enjoy the privileges, immunities and facilities of a diplomatic agent within the meaning of the Vienna Convention on Diplomatic Relations of 16 April 1961.

2. The staff of the Registry shall enjoy the privileges, immunities and facilities necessary to the performance of their functions.

3. Counsel, experts and witnesses before the Court shall enjoy the privileges and immunities necessary to the independent exercise of their duties.

4. The judges may by an absolute majority decide to revoke a privilege or waive an immunity conferred by this article, other than an immunity of a judge, the Prosecutor or Registrar as such. In the case of other officers and staff of the Procuracy or Registry, they may do so only on the recommendation of the Prosecutor or Registrar, as the case may be.

II. PROPOSALS

FRANCE

1. The judges, the Prosecutor, the Deputy Prosecutors, the Registrar and the Deputy Registrar shall enjoy the privileges, immunities and facilities of a diplomatic agent within the meaning of the Vienna Convention on Diplomatic Relations of 16 April 1961.

2. The staff of the Registry and other staff members of the Court shall enjoy the privileges, immunities and facilities necessary for the independent performance of their functions.

3. Counsel, experts and witnesses before the Court shall enjoy the privileges and immunities necessary for the independent exercise of their duties.

4. With the exception of those referred to in paragraph 1 of this article, the privileges, immunities and facilities granted may be revoked or waived by a decision taken by an absolute majority, by secret ballot, of the General Assembly of Judges of the Court.

ISRAEL

Replace paragraph 1 by the following:

"Members of the Court shall enjoy diplomatic privileges and immunities when engaged in the business of the Court".

Article 17

Allowances and expenses

I. ILC DRAFT

1. The President shall receive an annual allowance.

2. The Vice-Presidents shall receive a special allowance for each day they exercise the functions of the President.

3. Subject to paragraph 4, the judges shall receive a daily allowance during the period in which they exercise their functions. They may continue to receive a salary payable in respect of another position occupied by them consistently with article 10.

4. If it is decided under article 10 (4) that judges shall thereafter serve on a full-time basis, existing judges who elect to serve on a full-time basis, and all judges subsequently elected, shall be paid a salary.

II. PROPOSALS

FRANCE

Remuneration

All permanent members of the Court, as defined in article 5 (2) and (3) shall receive remuneration. Judges who sit only on a temporary basis shall receive a daily allowance during the period in which they perform their functions. They may continue to receive a salary payable in respect of another position occupied by them.

ALGERIA, EGYPT, JORDAN, KUWAIT AND LIBYAN ARAB JAMAHIRIYA

Several delegations have argued that judges should be paid on a per diem basis. This is, in principle, offensive to judicial dignity and judicial independence. It would also limit the pool of candidates who would be willing to serve under those conditions. All judges should receive a base salary of no less than half of the salary received by ICJ judges. Those who are in function should receive additional compensation on a pro-rata basis up to the maximum of the equivalent compensation received by ICJ judges.

Article 18

Working languages

I. ILC DRAFT

The working languages of the Court shall be English and French.

II. PROPOSALS

AUSTRALIA AND NETHERLANDS

(a) As provided for in article **X** (A 18 ILC) of the Statute, the working languages of the Court shall be English and French.

(b) An accused shall have the right to use his or her own language and to have the benefit of interpretation and translation provided for in article **X** (A 41.1 (f) ILC) of the Statute.

(c) Any other person appearing before the Tribunal, other than as counsel, who does not have sufficient knowledge of either of the two working languages, may use his or her own language and have the benefit of interpretation and translation on the basis of the same criteria applied to an accused under article **X** (A 41.1 (f) ILC) of the Statue.

(d) Counsel for an accused may apply to the Presiding Judge of a chamber for leave to use a language other than the two working languages or the language of the accused. If such leave is granted, the expenses of interpretation and translation shall be borne by the Court to the extent, if any, determined by the President, taking into account the rights of the defence and the interests of justice.

(e) Documents filed with the Court shall be in one of the working languages or accompanied by a translation into one of those languages.

(f) The Registrar shall make any necessary arrangements for interpretation and translation into and from the working languages.

Article 19

Rules of the Court

I. ILC DRAFT

1. Subject to paragraphs 2 and 3, the judges may by an absolute majority make rules for the functioning of the Court in accordance with this Statute, including rules regulating:

(a) the conduct of investigations;

(b) the procedure to be followed and the rules of evidence to be applied;

(c) any other matter which is necessary for the implementation of this Statute.

2. The initial Rules of the Court shall be drafted by the judges within six months of the first elections for the Court, and submitted to a conference of States parties for approval. The judges may decide that a rule subsequently made under paragraph 1 should also be submitted to a conference of States parties for approval.

3. In any case to which paragraph 2 does not apply, rules made under paragraph 1 shall be transmitted to States parties and may be confirmed by the Presidency unless, within six months after transmission, a majority of States parties have communicated in writing their objections.

4. A rule may provide for its provisional application in the period prior to its approval or confirmation. A rule not approved or confirmed shall lapse.

II. PROPOSALS

FRANCE

The rules of organization, functioning and procedure of the Court not set out in this Statute shall appear in the regulations and the rules of procedure of the Court.

Draft regulations and rules of procedure of the Court shall be prepared by the General Assembly of judges. They shall be adopted by the General Assembly of the States parties, which may amend them.

The rules and regulations adopted in accordance with the preceding paragraph may be amended under the same conditions.

FINLAND

1. The States Parties [may] [shall] by an absolute majority adopt rules for the functioning of the Court in accordance with this Statute, including rules regulating:

(a) the conduct of investigations;

(b) the procedure to be followed and the rules of evidence to be applied;

(c) any other matter which is necessary for the implementation of this Statute.

2. [Any State Party] [Five States Parties] may propose an amendment to the rules of the Court and file it with the [Registrar] [Secretary-General of the United Nations]. The judges may decide by an absolute majority to propose an amendment to the rules of the Court. The [Registrar] [Secretary-General] shall communicate to States parties the amendment proposed by any State Party or by the judges. The amendment shall be considered adopted unless within [three] months from the date of such communication [a majority] of States Parties have communicated in writing their objection.

3. The judges may by an absolute majority adopt supplementary rules in accordance with the rules of the Court.

AUSTRALIA AND NETHERLANDS

Interpretation of the rules

(a) To the extent that the plain language of the rules does not require otherwise, they should be interpreted to ensure simplicity in procedure, fairness to the parties and the elimination of unjustified delay.

(b) In the rules, the singular shall include the plural, and vice versa.

Authentic texts

The English and French texts of the rules shall be equally authentic. In case of discrepancy, the version which is more consonant with the spirit of the Statute and the rules shall prevail.

Non-compliance with the rules

(a) Any objection by a party to an act of another party on the ground of non-compliance with the rules shall be raised with the Presidency, Trial Chamber or Appeals Chamber, as appropriate, at the earliest opportunity.

(b) The Presidency, Trial Chamber or Appeals Chamber shall rule without delay on whether there has been non-compliance with the rules.

(c) When non-compliance is ruled to have occurred, the Presidency, Trial Chamber or Appeals Chamber shall have the discretion not to make an order if the non-compliance with a rule is not of a serious nature. The party at fault, however, must subsequently comply with the rule in question.

(d) When the Presidency, the Trial Chamber or the Appeals Chamber rules that the non-compliance is of a serious nature, they may make an appropriate order, including the exclusion of evidence. In cases where the non-compliance is contrary to the fundamental principles of fairness and has occasioned a miscarriage of justice, an order may be made for the indictment against the accused to be dismissed.

(e) A party may appeal a ruling or order made by the Presidency or a Trial Chamber under this rule to the Appeals Chamber.

[Note. Some delegations proposed that article 19 might suitably be discussed in connection with the Rules of Procedure, Fair Trial and Rights of the Accused.]

Article A 1/

Compensation

PROPOSAL

JAPAN

1. The Court shall make compensation to those who were:

(a) pronounced innocent by an irrevocable adjudication;

(b) arrested or detained for the purpose of prosecution, although the prosecution against him did not eventually take place;

(c) arrested or detained but the lawfulness of that arrest or detention was denied in accordance with this Statute; or

(d) illegally inflicted losses upon by an officer of the Court intentionally or negligently in the course of performing his duties.

2. Procedures and criteria for compensation shall be provided in the rules, including the expenses to be borne by a complainant State if that State lodged a complaint without sufficient reason.

[Note. The question of compensation is also addressed in the document compiled by the informal group on the Rules of Procedure, Fair Trial and Rights of the Accused.]

1/ There is no equivalent article in the draft proposal by the International Law Commission.

PART 3. JURISDICTION OF THE COURT

Article 20*

Crimes within the jurisdiction of the Court

I. ILC DRAFT

The Court has jurisdiction in accordance with this Statute with respect to the following crimes:

(a) the crime of genocide;

(b) the crime of aggression;

(c) serious violations of the laws and customs applicable in armed conflict;

(d) crimes against humanity;

(e) crimes, established under or pursuant to the treaty provisions listed in the Annex, 2/ which, having regard to the conduct alleged, constitute exceptionally serious crimes of international concern.

II. PROPOSALS

The Court has jurisdiction in accordance with this Statute with respect to the following crimes:

(a) the crime of genocide;

(b) crimes against humanity;

(c) the crime of aggression;

(d) serious violations of the laws and customs applicable in armed conflicts;

(e) - grave breaches of the four Geneva Conventions of 12 August 1949;

- grave breaches of article 3 common to the four Geneva Conventions of 12 August 1949.

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* Note. See the footnote to the proposals on the preamble, at the beginning of the present volume.

2/ See appendix II of the annex to the ILC draft.

A. Genocide

Alternative 1. Definition by reference

The Court has jurisdiction in accordance with this Statute with respect to the following crimes:

(a) the crime of genocide **[as defined in the Convention on the Prevention and Punishment of the Crime of Genocide of 1948;]**

[With respect to the interpretation and application of the crimes within the jurisdiction of the Court, the Court shall apply relevant international conventions and other sources of international law.]

Alternative 2. Definition modelled on Genocide Convention with or without modification

Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such:

(a) killing members of the group;

(b) causing serious bodily or mental harm to members of the group;

(c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(d) imposing measures intended to prevent births within the group;

(e) forcibly transferring children of the group to another group.

[The following acts shall also be punishable:

(a) conspiracy to commit genocide;

(b) direct and public incitement to commit genocide;

(c) attempt to commit genocide;

(d) complicity in genocide.] 3/

* * *

1. Genocide means any of the following acts committed **[, whether in time of peace or in time of armed conflict]** with intent to destroy, in whole or in

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3/ Chairman's informal text (see A/AC.249/1, p. 58); see also A/AC.249/L.3, article 28. The acts enumerated here are identical to those of articles II and III of the 1948 Convention on the Prevention and Punishment of Genocide.

The paragraph in square brackets above may become unnecessary if there is a separate article covering those elements.

[substantial] part, a national, ethnic, racial or religious group, **[social or political]** as such: 4/

(a) killing members of the group;

(b) causing serious bodily or mental harm to members of the group;

(c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(d) imposing measures intended to prevent **[preventing]** births within the group;

(e) forcibly transferring children **[persons]** of the group to another group.

2. The following acts shall be punishable: 5/

(a) genocide;

(b) conspiracy to commit genocide;

(c) direct and public incitement to commit genocide;

(d) attempt to commit genocide;

(e) complicity in genocide.

[3. Persons committing genocide or any of the other acts enumerated above shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.] 6/

[4. "Intent to destroy, in whole or in part, a national ethnical, racial or religious group" means the specific intent to destroy, in whole or in substantial part, a national, ethnical, racial or religious group as such by the acts specified in the definition.

5. "Mental harm" means permanent impairment of mental faculties through drugs, torture or similar techniques.]

4/ Text reproduced from article II of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. Additions are indicated in bold type.

5/ Another suggestion is to delete this paragraph and to include, in the General Part of the Statute, provisions regarding conspiracy, incitement, attempt and complicity in the commission of the core crimes under the court's jurisdiction.

6/ Text reproduced from article IV of the Genocide Convention.

B. Aggression [7]

Paragraph 1

[1. Aggression means an act committed by an individual who, as leader or organizer, is involved in the use of armed force by a State against the territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations.]

* * *

[1. The crime of aggression is committed by a person who is in a position of exercising control or capable of directing political/military actions in his State, against another State, in contravention to the Charter of the United Nations, by resorting to armed force, to threaten or violate that State's sovereignty, territorial integrity or political independence.]

Paragraph 2

2. Acts constituting aggression include the following:

* * *

[(a) the invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however, temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;

(b) bombardment by the armed forces of a State against the territory of another State, [or the use of any weapons by a State against the territory of another State.]

(c) the blockade of the ports or coasts of a State by the armed forces of another State;

(d) an attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;

(e) the use of armed forces of one State which are within the territory of another State with the agreement of the receiving State in contravention of the conditions provided for in the agreement, or any extension of their presence in such territory beyond the termination of the agreement;

(f) the action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;

(g) the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.]

* * *

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[7] The following proposals represent a number of alternatives for illustrative purposes. Some delegations believe that they are all inadequate.

Some delegations are for and some are against the inclusion of "aggression" in the crimes covered by the International Criminal Court.

[Crimes against peace, namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.]

* * *

[1. Aggression means the use of force or the threat of use of force [by a State] against the sovereignty, territorial integrity or political independence of [another] [a] State, or the use of force or threat of use of force in any other manner inconsistent with the Charter of the United Nations and customary international law.]

[2. The crime of aggression is committed by an individual who as leader or organizer plans, commits or orders the commission of an act of aggression.]

* * *

The crime of aggression means planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing acts.

C. War Crimes

[War crimes] means: 8/

1. Grave breaches referred to in the Geneva Conventions of 12 August 1949 [and of Additional Protocol I thereto of 8 June 1977] [such as] [namely]:

[(a) wilful killing;

(b) torture or inhuman treatment, including biological experiments;

(c) wilfully causing great suffering or serious injury to body or health;

(d) extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;

(e) compelling a prisoner of war or a civilian to serve in the forces of a hostile Power;

(f) wilfully depriving a prisoner of war or a civilian of the rights of fair and regular trial;

(g) unlawful deportation or transfer or unlawful confinement of a civilian;

(h) taking civilians as hostages.]

8/ The present text (Chairman's revised informal text) represent a compilation of different possibilities for illustrative purposes. Adaptations of this text may be required after completion of the definitions of crimes and discussion of jurisdiction and other related issues.

[(i) making the civilian population or individual civilians the object of attack;

(j) the perfidious use of the distinctive emblem of the red cross, red crescent or red lion and sun or of other recognized protective signs recognized under international law;

(k) launching an attack against works or installations containing dangerous forces in the knowledge that such attacks will cause excessive loss of life, injury to civilians or damage to civilian objects;

(l) practices of apartheid and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination;

(m) making clearly recognized historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples and to which special protection has been given by special arrangement, for example, within the framework of a competent international organization, the object of attack, causing, as a result, intensive destruction thereof, where there is no evidence of the violation by the adverse party of using such objects in support of a military effort, and when such historic monuments, works of art and places of worship are not located in the immediate proximity of military objectives;

(n) the transfer by the occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory in violation of article 49 of the Fourth Convention;

(o) making non-defended localities and demilitarized zones the object of attack;

(p) unjustifiable delay in the repatriation of prisoners of war or civilians.]

[2. Other serious violations of the laws and customs [of war] [applicable in armed conflict], [whether of an international or of a non-international character] [which include, but are not limited to,] [namely] the violations referred to in the 1907 Hague Convention No. IV, [and the serious violations of article 3 common to the Geneva Conventions of 12 August 1949] [and of Additional Protocol II thereto of 8 June 1977] [include but are not limited to] [are]:

[(a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering;

(b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity;

(c) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings or buildings;

(d) seizure of, destruction of or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science;

(e) plunder of public or private property;

(f) violence to the life, health and physical or mental well-being of persons, in particular murder, manslaughter, [rape] [and sexual violence] as well as cruel treatment such as torture, mutilation or any form of corporal punishment, [and human experimentation];

(g) collective punishments;

(h) taking of hostages;

(i) acts of terrorism;

(j) outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;

(k) slavery, [and the slave trade,] [slave-related practices, and forced labour] in all their forms;

(l) pillage;

(m) usage of human shields;

(n) acts of violence designed to inspire or instil terror into that population in whole or in part;

(o) the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording fundamental judicial guarantees which are recognized [under general principles of international law];

(p) forcibly using members of the civilian population, including children, to take part in hostilities or to perform forced labour or labour related to military purposes];

(q) failure to remove or protect civilians, particularly children, from areas in which hostilities are taking place to safer areas within the State of nationality of the civilian population, and with respect to children, to ensure that they are accompanied by persons responsible for their safety and well-being];

(r) starving of the civilian population and prevention of humanitarian assistance from reaching them;

(s) intentionally separating children from parents or persons responsible for their safety and well-being;

(t) failure to medically treat the wounded, the sick, the shipwrecked and persons deprived of their liberty for reasons related to the armed conflict;

(u) mistreatment of persons detained or interned].

* * *

[Unless they constitute crimes mentioned in the subparagraph (above) 9/ **(below),]** An individual who commits or orders the commission of an exceptionally serious war crime shall, on conviction thereof, be sentenced to [...].

For the purposes of this Code **[of the present Statute] [of the present Convention]**, a war crime means:

1. Grave breaches of the Geneva Conventions of **[12 August]** 1949, namely: **[, the following acts against persons or property protected under the provisions of the relevant Geneva Conventions:]**

(a) wilful killing;

(b) torture or inhuman treatment, including biological experiments;

(c) wilfully causing great suffering or serious injury to body or health;

(d) extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;

(e) compelling a prisoner of war or a civilian to serve in the forces of a hostile Power;

(f) wilfully depriving a prisoner of war or a civilian of the rights of fair and regular trial;

(g) unlawful deportation or transfer or unlawful confinement of a civilian;

(h) taking civilians as hostages.

2. **[The following] [Other serious]** Violations of the laws **[applicable in armed conflicts]** or **[and]** customs of war, **[whether international or internal in character,]** which include, but are not limited to: **[, including serious violations of article 3 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol thereto of 8 June 1977. These violations shall include, but shall not be limited to:]**

[(a) making the civilian population or individual civilians the object of attack]

(a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering;

(b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity;

9/ Unless indicated in bold type, the present text is based on the revised article on war crimes proposed by the Special Rapporteur of the International Law Commission for consideration in second reading of the draft Code of Crimes against the Peace and Security of Mankind (A/CN.4/466, p. 26). In the text of one proposal, the order of paragraphs 1 and 2 of the draft article should be inverted.

(c) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings or buildings;

(d) seizure of, destruction of or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science;

(e) plunder of public or private property.

[3. In the case of armed conflict not of an international character occurring in the territory of a State Party:]

[(a) violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;

(b) collective punishment;

(c) taking of hostages;

(d) acts of terrorism;

(e) outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and other forms of indecent assault;

(f) pillage;

(g) the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.]

[(h) threats to commit any of the acts listed under paragraph 3 above.]

* * *

Serious violations of the laws and customs of war

The following acts are considered serious violations of the laws and customs of war:

(a) killing or wounding treacherously individuals belonging to the hostile nation or army;

(b) killing or wounding an enemy who, having laid down arms, or having no longer means of defence, has surrendered at discretion;

(c) declaring that no quarter will be given;

(d) making improper use of a flag of truce, of the national flag or of the military insignia and uniform of the enemy, of the uniform of multinational forces in the context of a peace-making or peace-keeping operation, as well as the distinctive badges of the Geneva Convention;

(e) destroying or seizing the enemy's property, unless such destruction or seizure be imperatively demanded the necessities of war;

(f) declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party;

(g) compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war;

(h) attacking or bombarding by whatever means towns, villages, dwellings or buildings which are undefended;

(i) pillaging a town or place, even when taken by assault;

(j) using certain categories of projectiles which are explosive or charged with fulminating or inflammable substances, such as those referred to in the St. Petersburg Declaration of 1868;

(k) using bullets which expand or flatten easily inside the human body, as defined in the Hague Declaration of 29 July 1899;

(l) using asphyxiating, poisonous or other gases and bacteriological methods as defined in the Geneva Protocol of 1925, as well as microbial agents or toxins, as defined in the 1972 Biological Weapons Convention;

(m) using chemical weapons as defined in article 2 of the 1993 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction;

(n) directing attacks against historical monuments, works of art or clearly recognized places of worship constituting the cultural heritage, unless such attacks be imperatively demanded by the necessities of war.

Grave breaches of the Geneva Conventions

1. Grave breaches of the Geneva Conventions of 12 August 1949 are:

(a) With regard to the wounded and sick in armed forces in the field and wounded, sick and shipwrecked members of armed forces at sea: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;

(b) With regard to prisoners of war: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, compelling a prisoner of war to serve in the forces of the hostile Power, or wilfully depriving a prisoner of war of the rights of fair and regular trial prescribed in the Conventions referred to in this article;

(c) With regard to the protection of civilian persons in time of war: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the Conventions referred to in this article, taking of hostages, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

2. Grave breaches of article 3 common to the four Geneva Conventions of 12 August 1949 are, at all times and in any place, in the case of an armed conflict not of an international character occurring on the territory of one of the States parties, the following acts against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause:

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(b) taking of hostages;

(c) outrages upon personal dignity, in particular humiliating and degrading treatment;

(d) the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

* * *

Violations of article 3 common to the Geneva Conventions and of Additional Protocol II

The International Criminal Court shall have the power to prosecute persons committing or ordering to be committed serious violations of article 3 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims and of Additional Protocol II thereto of 8 June 1977 where, having regard to the conduct alleged, these acts constitute serious causes of international concern, including but not limited to:

[subparagraphs (a) to (g) as in para. 3 of the preceding formulation]

D. Crimes against humanity

"Crimes against humanity" means the following [crimes] [acts], when committed as part of a widespread [and] [or] systematic attack [on a massive scale] against any civilian population:

(a) [murder] [wilful killing];

(b) extermination;

(c) enslavement;

(d) deportation [or forcible transfer of population];

(e) imprisonment [, including taking of civilian hostages];

(f) torture [or other forms of cruel treatment];

(g) rape [or other serious assaults of a sexual nature];

(h) persecutions on political, [national, ethnic,] racial and religious grounds [in connection with any [other] crime within the jurisdiction of the Court];

(i) [other inhumane acts of a similar character [, such as] wilfully causing great suffering or serious injury to body and health];

[other inhumane acts which cause serious injury to body or health]. 10/

* * *

[1. A person commits crimes against humanity, whether in time of peace or in time of war, when:

(a) he is in a position of authority and orders, commands, or fails to prevent the systematic commission of the acts described below, against a given segment of the civilian population;

(b) he is in a position of authority and participates in the making of a policy or programme designed to systematically carry out the acts described below against a given segment of the civilian population;

(c) he is in a senior military or political position and knowingly carries out or orders others to carry out systematically the acts described below against a segment of the civilian population;

(d) he knowingly commits the acts described below with intent to further a policy of systematic persecution against a segment of the civilian population without having a moral choice to do otherwise.]

* * *

[The International Criminal Court] shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population on **[discriminatory]** [national, political, ethnic, racial or religious] grounds: **[and which, having regard to the conduct alleged, constitute serious crimes of international concern]**;

* * *

[For the purposes of the present Convention "crimes against humanity" means the following acts when committed as part of a widespread and systematic attack against any civilian population unless they constitute crimes defined in the preceding provision:]

* * *

10/ Chairman's informal text. Adaptations of this text may be required after completion of the definitions of crimes and discussion of jurisdiction and other related issues.

[The acts constituting "crimes against humanity" when committed systematically or as part of a public policy against a segment of the civilian population are:]

* * *

[A crime against humanity means the widespread or systematic commission, raising international concern, of any or more of the following acts:]

* * *

[The following acts when committed as part of a widespread and systematic attack against any civilian population shall be punishable:]

* * *

[Crimes against humanity means the following: crimes when committed in armed conflicts, whether international or internal in character, as part of a widespread or systematic attack on a massive scale against any civilian population.]

* * *

1. A person commits a crime against humanity when:

(a) he commits one of the acts described in paragraph 2; and

[(b) that act is part of a widespread and systematic attack against a civilian population]

* * *

[(c) he commits that act [knowing it is part of] [with the intent to further] a widespread and systematic attack against a civilian population]

2. Acts constituting a crime against humanity when committed as part of a widespread and systematic attack against a civilian population are the following:

* * *

[(a) A person commits crimes against humanity, whether in time of peace or in time of war, when he knowingly commits the acts described below against a segment of the civilian population, and when these acts are part of a systematic policy or when they are committed on a widespread basis. 11/

(b) The acts constituting "crimes against humanity" are:]

(a) **[wilful]** murder **[killing or extermination] [, including killings by knowingly creating conditions likely to cause death]**;

[(b) mutilation];

(b) extermination;

11/ Unless indicated in bold type, this text is based on article 3 on crimes against humanity of the Statute of the International Criminal Tribunal for Rwanda.

(c) enslavement [, including slavery-related practices and forced labour]; [establishing or maintaining over persons a status of slavery, servitude or forced labour];

(d) [discriminatory and arbitrary] deportation [or unlawful confinement of civilian population] [in violation of international legal norms] [which inflicts death or serious bodily injury];

(e) imprisonment [, in violation of international norms on the prohibition of arbitrary arrest and detention] [which inflicts death or serious bodily injury];

(f) [cruel treatment including] torture [, rape and other serious assaults of a sexual nature];

(g) [outrages upon personal dignity, in particular humiliation and degrading treatment,] rape [, enforced prostitution];

(h) persecutions on political, racial and religious [or cultural] grounds [, whether based on laws or practices targeting selected groups or their members in ways that seriously and adversely affect their ethnic, cultural or religious life, their collective well-being and welfare, or their ability to maintain group identity];

[(h bis) taking civilians as hostages];

[(h ter) wilfully depriving a civilian of the rights of fair and regular trial];

(i) other inhumane acts [of a similar nature] [, including but not limited to attacks upon physical integrity, personal safety and individual dignity, such as physical mutilation, forced impregnation or forced carrying to term of fetuses that are the product of forced impregnation, and unlawful human experimentation].

[Annex

(a) Wilful killing means intentionally or knowingly causing the death of another person, or [causing the death of another person under circumstances manifesting extreme indifference to human life.]

(b) Extermination means:

- **(i) mass murder; or**
- **(ii) intentionally inflicting conditions of life [calculated to] [which the accused knew or had reason to know would] bring about the physical destruction of a defined segment of the population.**

(c) Enslavement means intentionally placing or maintaining a person in a condition in which any or all of the powers attaching to the right of ownership are exercised over him.

(d) Deportation means mass deportation or forced transfer of persons from the territory of a State [or from an area within a State] of which such persons are nationals or lawful permanent residents, except where the acts constituting

deportation or transfer are for purposes of an evacuation for safety or other legitimate and compelling reasons.

(e) Imprisonment means the forcible confinement of a person for a prolonged or indefinite period of time in manifest and gross violation of governing legal norms regarding arrest and detention.

(f) Torture means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the accused's custody or physical control; except that torture shall not include pain and suffering arising only from, inherent in or incidental to, lawful sanctions.

(g) Rape means causing a person to engage in or submit to a sexual act by force or threat of force.

(h) Enforced prostitution means intentionally placing or maintaining a person in circumstances in which the person is expected or directed to engage repeatedly over time in sexual acts, and the person's capacity or freedom to refuse has been substantially negated because of the force or threat of force, the circumstances, loss of physical liberty, mental impairment or prolonged periods of serious mental or physical abuse.

(i) Persecution means the intentional and severe deprivation of fundamental rights, without lawful justification.

(j) The term "widespread" means the attack is massive in nature and directed against large numbers of individuals.

(k) The term "systematic" means the attack constitutes, or is part of, consistent with or in furtherance of, a policy or concerted plan, or repeated practice over a period of time.]

* * *

Crimes against humanity mean any of the following acts committed on a massive and systematic scale against a group of the civilian population on political, philosophical, racial, ethnic or religious grounds:

(a) wilful killing;

(b) enslavement;

(c) kidnapping followed by the disappearance of the person;

(d) deportation;

(e) arbitrary detention;

(f) rape;

(g) any form of persecution on these grounds;

(h) torture or any other inhumane act causing great suffering or serious injury to physical or mental integrity or health.

Article 21

Preconditions to the exercise of jurisdiction

I. ILC DRAFT

1. The Court may exercise its jurisdiction over a person with respect to a crime referred to in article 20 if:

(a) in a case of genocide, a complaint is brought under article 25 (1);

(b) in any other case, a complaint is brought under article 25 (2) and the jurisdiction of the Court with respect to the crime is accepted under article 22:

(i) by the State which has custody of the suspect with respect to the crime ("the custodial State"); and

(ii) by the State on the territory of which the act or omission in question occurred.

2. If, with respect to a crime to which paragraph 1 (b) applies, the custodial State has received, under an international agreement, a request from another State to surrender a suspect for the purposes of prosecution, then, unless the request is rejected, the acceptance by the requesting State of the Court's jurisdiction with respect to the crime is also required.

II. PROPOSALS

1. The Court (may exercise its) [**shall have**] jurisdiction (over a person with respect to a crime) referred to in article 20 (f):

(a) in a case of genocide, a complaint is brought under article 25 (1);

(b) in any other case, a complaint is brought under article 25 (2) and the jurisdiction of the Court with respect to the crime is accepted under article 22:

(i) by the State which has custody of the suspect with respect to the crime ("the custodial State") [**in accordance with international law**]; (and)

(ii) by the State on the territory of which the act or omission in question occurred [**if applicable**].

2. If, with respect to a crime to which paragraph 1 (b) applies, the custodial State has received, under an international agreement, a request from another State to surrender a suspect for the purposes of prosecution, then, unless the request is rejected, the acceptance by the requesting State of the Court's jurisdiction with respect to the crime is also required.

Proposals for replacing article 21

[1. The Court may exercise its jurisdiction over a person with respect to a crime referred to in article 20 in accordance with the provisions of this Statute if:

(a) the matter is referred to the Court by the Security Council acting under Chapter VII of the Charter of the United Nations;

(b) a complaint is lodged by an interested State in accordance with article 25;

(c) the matter was notified to the Prosecutor and he/she concludes that there is sufficient basis for a prosecution in accordance with articles 26 and 27.

2. In the case of subparagraphs 1 (b) and (c) the Court may exercise its jurisdiction only if the States which have jurisdiction over the case in question have accepted the jurisdiction of the Court in accordance with article 22 and if national jurisdiction is either not available or ineffective or if those States have deferred the matter to the Court.]

* * *

[1. The Court may exercise its jurisdiction over a person with respect to a crime referred to in article 20 if a complaint is brought under article 25 and the jurisdiction of the Court with respect to the crime is accepted under article 22:

(a) by the State which has custody of the suspect with respect to the crime ("custodial State"); and

(b) by the State on the territory of which the act or omission in question occurred.

2. If, with respect to a crime to which paragraph 1 applies, the custodial State has received, under an international agreement, a request from another State to surrender a suspect for the purposes of prosecution, then, unless the request is rejected, the acceptance by the requesting State of the Court's jurisdiction with respect to the crime is also required.]

* * *

[1. The Court may exercise its jurisdiction over a person with respect to a crime referred to in Article 20 and in accordance with the provisions of this Statute if:

(a) the matter is referred to the Court by the Security Council acting under Chapter VII of the Charter of the United Nations; or

(b) a complaint is brought by a State Party.

2. The Court shall not exercise its jurisdiction with respect to the crime referred to in article 20 (d) unless the Security Council has first determined that a State has committed an act of aggression.]

* * *

Consent of States

The jurisdiction of the Court extends to all crimes referred to in articles __ to __ when the following have expressed their agreement:

(a) the State(s) on whose territory the acts were committed;

(b) the State(s) of the nationality of the victim(s) of those acts; and

(c) the State(s) of the nationality of the person(s) suspected to having committed the acts.

Article 22

Acceptance of the jurisdiction of the Court for the purposes of article 21

I. ILC DRAFT

1. A State party to this Statute may:

(a) at the time it expresses its consent to be bound by the Statute, by declaration lodged with the depositary; or

(b) at a later time, by declaration lodged with the Registrar;

accept the jurisdiction of the Court with respect to such of the crimes referred to in article 20 as it specifies in the declaration.

2. A declaration may be of general application, or may be limited to particular conduct or to conduct committed during a particular period of time.

3. A declaration may be made for a specified period, in which case it may not be withdrawn before the end of that period, or for an unspecified period, in which case it may be withdrawn only upon giving six months' notice of withdrawal to the Registrar. Withdrawal does not affect proceedings already commenced under this Statute.

4. If under article 21 the acceptance of a State which is not a party to this Statute is required, that State may, by declaration lodged with the Registrar, consent to the Court exercising jurisdiction with respect to the crime.

II. PROPOSALS

Proposal 1

[1. A State which becomes a party to this Statute thereby accepts the inherent jurisdiction of the Court with respect to crimes referred to in article 2, paragraphs (a) to (d).

2. With regard to the crimes referred to in article 20 (e) a State party to this Statute may declare:

(a) at the time it expresses its consent to be bound by the Statute, or

(b) at a later time that it accepts the jurisdiction of the Court with respect to such of the crimes as it specifies in the declaration. (Para. 2 shall be maintained only if "treaty crimes" are included in the statute)]

Proposal 2

[The Court shall satisfy itself that it has jurisdiction in any case brought before it.]

[Part 3 has optional jurisdiction of the Court.]

(If the so-called "treaty crimes" were to be comprised in the jurisdiction of the Court, this part would organize the regime thereof along the lines contained in article 21 (i) (b), (2) and article 22 of the present ILC draft statute.)

Article 23

Action by the Security Council

I. ILC DRAFT

1. Notwithstanding article 21, the Court has jurisdiction in accordance with this Statute with respect to crimes referred to in article 20 as a consequence of the referral of a matter to the Court by the Security Council acting under Chapter VII of the Charter of the United Nations.

2. A complaint of or directly related to an act of aggression may not be brought under this Statute unless the Security Council has first determined that a State has committed the act of aggression which is the subject of the complaint.

3. No prosecution may be commenced under this Statute arising from a situation which is being dealt with by the Security Council as a threat to or breach of the peace or an act of aggression under Chapter VII of the Charter, unless the Security Council otherwise decides.

II. PROPOSALS

[1. **A State Party may lodge a complaint with the Prosecutor alleging that a crime referred to in article 20 appears to have been committed.**

2. As far as possible a complaint shall specify the circumstances of the alleged crime and the identity and whereabouts of any suspect, and be accompanied by such supporting documentation as is available to the complainant State.

3. In a case to which article 21 (a) applies, a complaint is not required for the initiation of an investigation.]

* * *

1. Notwithstanding article 21, the Court has jurisdiction in accordance with this Statute with respect to crimes (referred to) [**specified**] in article 20 as a consequence of the referral of a (matter) [**situation**] to the Court by the Security Council (acting under Chapter VII of the Charter of the United Nations.) [**in accordance with the terms of such referral.**]

Delete original paragraph 2 of the ILC draft.

2. No prosecution may be commenced under this Statute arising from a [**dispute or**] situation (which is being dealt with by the Security Council as a threat to or breach of the peace or an act of aggression under Chapter VII of the Charter, unless the Security Council otherwise decides.) [**pertaining to international peace and security or an act of aggression which is being dealt with by the Security Council without the prior consent of the Security Council.**]

[If "aggression" were to be included in article 20, then, according to the above proposal, the retention of the original paragraph 23 (2) of the ILC draft

statute would be necessary, with the renumbering of the above-stated subparagraph 2 as article 23 (3).]

* * *

Role of the Security Council

1. Notwithstanding article 34, the Security Council acting under Chapter VII of the Charter of the United Nations, can decide to refer a situation or acts constituting crimes to the Prosecutor of the Court when one or more of the crimes referred to in article 27 **appear** to **have been committed**.

Notification of the Security Council decision to the Prosecutor of the Court shall be accompanied by all evidence available to the Council.

2. A complaint of or directly related to a crime of aggression referred to in articles 27 (c) and 30 may not be brought unless the Security Council has first determined that a State has committed the act of aggression which is the subject of the complaint, in accordance with Chapter VII of the Charter of the United Nations.

3. No prosecution may be commenced under this Statute arising from a situation which is being dealt with by the Security Council as a threat to or breach of the peace or an act of aggression under Chapter VII of the Charter, unless the Security Council otherwise decides.

* * *

Other proposals

Paragraph 1

Notwithstanding article 21, the Court has jurisdiction in accordance with this Statute with respect to crimes referred to in article 20 as a consequence of the referral of a (matter) [**case**] to the Court by the Security Council (acting under Chapter VII of the Charter of the United Nations) or [**acting under Chapters VI and VII of the Charter of the United Nations**]. [**As far as possible a referral shall specify the circumstances of the alleged crime and be accompanied by such supporting documentation as is available to the Security Council.**]

Paragraph 2

The determination of the Security Council that a State has committed an act of aggression shall be binding on the deliberation of the Court in respect of a complaint, the subject matter of which is the act of aggression.

Paragraph 3

(a) No prosecution may be commenced under this Statute arising from (a situation which is being dealt with by the Security Council) [**a situation where the Security Council has decided that there is a threat to or breach of the peace and for which it is exercising its functions under Chapter VII of the Charter of the United Nations**] as a threat to or breach of the peace or an act of aggression under Chapter VII of the Charter, unless the Security Council otherwise decides.

(b) **[The determination by the Security Council under paragraph 2 above shall not be interpreted as in any way affecting the independence of the Court in deciding on the commission of the crime of aggression by a given person.]**

(c) **[Should no action be taken in relation to a situation which has been referred to the Security Council as a threat to or breach of the peace or an act of aggression under Chapter VII of the Charter within a reasonable time, the Court shall exercise its jurisdiction in respect of that situation.]**

(d) **[Prosecution may be commenced under this Statute except where the Security Council decides in accordance with Article 27 of the Charter that it arises from a situation in respect of which effective action is being taken by the Security Council (as a threat to or breach of the peace or an act of aggression under Chapter VII of the Charter).]**

Proposals were also made to retain paragraph 1 of article 23 and to delete paragraphs 2 and 3.

Proposals were also made for the deletion of article 23.

Article 24

Duty of the Court as to jurisdiction

I. ILC DRAFT

The Court shall satisfy itself that it has jurisdiction in any case brought before it.

II. PROPOSALS

Concurrent jurisdiction

The Court has no jurisdiction under this Statute when:

(a) the acts mentioned in the submission to the Court are still being investigated by a State and the investigation is not manifestly intended to relieve the person concerned of criminal responsibility;

(b) the acts mentioned in the submission to the Court have already been duly investigated by a State and the decision not to institute proceedings was taken by that State when it had knowledge of all the acts mentioned in the submission and the decision was not motivated by a manifest willingness to relieve the persons concerned of any criminal responsibility;

(c) any person(s) mentioned in the submission to the Court have already been acquitted or convicted by a final ruling in a State for the acts involved unless the decision failed to take account of all facts contained in the submission or the proceedings were conducted in the State concerned by evading the rule of international law for the manifest purpose of relieving the persons concerned of criminal responsibility.

Verification of jurisdiction

The Court shall satisfy itself that it has jurisdiction in any case brought before it. Any State party competent to institute proceedings in connection with all or part of the acts brought before the Court, and any person named in the document of submission to the Court, may challenge the jurisdiction of the Court. The forms and periods set out in article 39, paragraphs 2 and 3, shall apply.

PART 3 bis. GENERAL PRINCIPLES OF CRIMINAL LAW* 12/

SECTION 1. SUBSTANTIVE ISSUES

Article A

Nullum crimen sine lege/Non-retroactivity

Proposal 1

1. [Provided that this Statute is applicable in accordance with articles 21, 22 or 23] a person shall not be criminally responsible under this Statute:

(a) In the case of a prosecution with respect to a crime referred to in articles 20 (a) to (d), unless the conduct in question constituted a crime [under international law] [under the definition of the crimes of this Statute] [or by national law which is in accordance with international law] at the time that the conduct occurred and such conduct occurred after the entry into force of this Statute;

(b) In the case of a prosecution with respect to a crime referred to in article 20 (e), unless the treaty in question was applicable to the conduct of the person at the time that the conduct occurred.

2. Paragraph 1 [1 (a)], above, shall not affect the character of such conduct as being crimes under international law, apart from this Statute.

3. If the law as it appeared at the commission of the crime is amended prior to the final judgement in the case, the most lenient law shall be applied.

[Note. A question was raised as to whether the term "international law" in paragraph 1 (a) needed to be clarified. Is it clear that the Statute's definition of a crime would be sufficient and exclusive for the purpose of establishing "a crime under international law" within the meaning of paragraph 1 (a), and that for the purposes of determining whether conduct constitutes a crime for this article, no reference need or should be made to other sources of international law, such as other conventions or customary international law? If it is not clear, should the paragraph refer to crimes as defined by the Statute?

Is a reference in paragraph 1 (a) to national law necessary if all crimes within the jurisdiction of the Court are defined by the Statute?

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* Note. The following is a compilation prepared by an informal group dealing with general principles of criminal law neither represents a text agreed upon among delegations nor suggests that every item should be included in the Statute. It identifies possible elements to be included and examples of some possible texts. The order of the articles as well as the headings are only of an indicative character and have not been finally agreed upon.

Delegations should bear in mind, wherever appropriate, the need to check the consistency of the texts in this compilation with those of existing international instruments.

12/ There is no equivalent of this part in the draft proposed by the International Law Commission.

Should paragraph 1 (b) also be qualified by the addition of the words "and such conduct occurred after the entry into force of this Statute", as in paragraph 1 (a)?]

Proposal 2

This Statute applies only to a conduct that is done after the entry into force of this Statute, and no conduct shall be punished by this Court unless it is an offence under the definition of the crimes of this Statute.

[2. The Statute shall describe precisely and unequivocally the punishable conducts under its competence and shall not leave doubts about their prohibition.

3. Punishable conducts shall not be construed and sanctions shall not be applied by analogy.]

Proposal 3

Jurisdiction ratione temporis

1. The Court has jurisdiction only in respect of acts committed after the date of entry into force of this Statute.

When a State becomes party to this Statute after its entry into force, the Court has jurisdiction only in respect of acts committed by its nationals or on its territory or against its nationals after the deposit by that State of its instrument of ratification or accession.

A non-party State may, however, by an express declaration deposited with the Registrar of the Court, agree that the Court has jurisdiction in respect of the acts that it specifies in the declaration.

2. The Court has no jurisdiction in respect of crimes for which, even if they have been committed after the entry into force of this Statute, the Security Council, acting under Chapter VII of the Charter of the United Nations, has decided before the entry into force of this Statute to establish an ad hoc international criminal tribunal.

The Security Council may, however, decide otherwise.

Article B

Individual criminal responsibility

a. Personal jurisdiction

Proposal 1

1. The International Tribunal shall have jurisdiction over [natural] persons pursuant to the provisions of the present statute.

2. A person who commits a crime under this statute is individually responsible and liable for punishment.

[2 bis. Criminal responsibility is individual and cannot go beyond the person and his/her possessions.]

3. The fact that the present Statute provides criminal responsibility for individuals does not [prejudice] [affect] the responsibility of States under international law.

Proposal 2

Physical persons and juridical persons

1. The Court shall be competent to take cognizance of the criminal responsibility of:

(a) Physical persons;

(b) Juridical persons, with the exception of States, when the crimes committed were committed on behalf of such juridical persons or by their agencies or representatives.

2. The criminal responsibility of juridical persons shall not exclude the criminal responsibility of physical persons who are perpetrators of or accomplices in the same crimes.

3. These provisions shall be without prejudice to the responsibility of States with respect to international law.

Note

Some delegations indicated that the expression "juridical persons" should extend to organizations lacking a legal status.

Some delegations expressed doubts about including the criminal responsibility of juridical persons into the Statute.

It was proposed as an alternative the possibility of referring to the "responsibility" of the juridical persons without including the word "criminal".

b. Principle of criminal responsibility

Criminal responsibility of principals

1. A person is criminally responsible as a principal and is liable for punishment for a crime under this Statute if the person, with the mental element required for the crime:

(a) Commits the conduct specified in the description (definition) of the crime;

(b) Causes the consequences, if any, specified in that description (definition); and

(c) Does so in the circumstances, if any, specified in that description (definition).

2. Where two or more persons jointly commit a crime under this Statute with a common intent to commit such crime, each person shall be criminally responsible and liable to be punished as a principal.

[3. A person shall be deemed to be a principal where that person commits the crime through an innocent agent who is not aware of the criminal nature of the act committed, such as a minor, a person of defective mental capacity or a person acting under mistake of fact or otherwise acting without mens rea.]

[Note. This article establishes the general principle regarding the liability of principal perpetrators of a crime. Further elaboration of the elements of this general principle, such as "mental element", "conduct" and causation, are elaborated in articles G and H.

Other persons who participate in the commission of a crime under this Statute would be criminally responsible and liable for punishment in the manner provided in articles B (c), I and J [and C] of this draft general part.

A question was raised whether this article is required, and whether it would be sufficient merely to state that a person who commits a crime under the Statute is criminally responsible and liable for punishment? On the other hand, it was noted that specificity of the essential elements of the principle of criminal responsibility was important; it serves as a foundation for many of the other subsequent principles and avoids the need to elaborate defences within the Statute that merely constitute negations of the existence of essential mental or physical elements.

It was noted that the choice of using the word "description" or "definition" was dependent upon answering the question whether the definition of crimes would be solely within the Statute (in which case the term "definition" would be appropriate) or whether further elaboration of the elements of the definition of a crime in the Statute might be contained in an annex (in which case the term "description" might be appropriate given that this term could encompass both the statutory definition and the annexed elaboration of elements)].

c. Participation/Complicity

Proposal 1

Responsibility of other persons in the completed crimes of principals

[1. A person who [plans,] aids, abets or solicits the commission of a crime under this Statute is criminally responsible and liable for punishment in accordance with that person's own individual responsibility apart from the responsibility of other participants.]

[2. A person who plans the commission of a crime under this Statute, which is committed by that person or another person, is criminally responsible and liable for punishment [shall be liable to the same punishment as provided in this Statute for a person who commits such crime as a principal].]

[3. A person may only be criminally responsible for planning the commission of a crime where so provided in this Statute.]

4. A person solicits the commission of a crime if, with the purpose of encouraging another person [making another person decide] to commit [or participate in the commission of] a specific crime, the person commands, [orders], requests, counsels or incites the other person to engage [or participate] in the commission of such crime, and the other person commits a crime [or is otherwise criminally responsible for such crime] as a result of such solicitation.

5. A person who solicits the commission of a crime is criminally responsible and liable for punishment [shall be liable to the same punishment as provided in this Statute for a person who commits such crime as a principal].

6. A person aids or abets the commission of a crime if the person does anything for the purpose of facilitating the commission of such crime by another person.

7. A person who aids or abets the commission of a crime is criminally responsible and liable for punishment {shall be liable to [a reduced punishment] [to the same punishment as provided in this Statute for a person who commits such crime as a principal]}.

[Note. The importance of being able to punish the planners was recognized. Under this article, planners are punishable only if a principal actually committed a crime as a result of such planning or soliciting. An alternative way of addressing the situation of planners is through the concept of "conspiracy"; see article J and notes relating to "conspiracy", below.

It was questioned whether paragraph 1 was redundant and should be deleted in light of the specific paragraphs that followed, which describe in greater detail the forms of participation, responsibility and liability for punishment.

A question was raised whether a person who solicits another person to commit a crime should be responsible and liable not only if the other person commits the crime that was solicited but also for any other crime that the other person committed which the solicitor foresaw (or reasonably could foresee) would be committed as a result of the solicitation.

A question raised by the draft proposals is whether a person should be liable as a solicitor only if the person solicits another to be a principal perpetrator or whether the person should also be liable for soliciting another person to participate in its commission as an aider and abettor (i.e. "otherwise criminally responsible").

It was questioned whether the Statute (in a new and separate article?) should also criminalize and punish a person in the situation where that person solicits another person to commit or criminally participate in a crime, but the other person does not commit the crime.

It was also questioned whether the Statute (in a new and separate article?) should also criminalize and punish persons who aid and abet another person after the commission of a crime; (e.g. aiding a person to escape detection or arrest, or destroying or concealing evidence).

It was suggested that provisions concerning the quantum of sentence should not be included in the General Part, but be located elsewhere in the Statute.]

Proposal 2

Criminal solicitation

1. A person is guilty of criminal solicitation, if, with the purpose of making another person decide to commit an offence, he/she commands, encourages or requests another person to engage in specific criminal conduct, when such person did criminal conduct according to such solicitation.

2. The punishment of criminal solicitation shall be the same as that of principals which is provided for in this Statute.

Accessories

1. A person is guilty of accessories if he/she did a conduct that facilitates the commission of an offence.

2. The punishment of accessories shall be reduced.

Proposal 3

Perpetrator and accomplice

1. An accomplice in a crime shall be punished as the perpetrator.

2. An accomplice is a person who knowingly, through aid or assistance, facilitates the preparation or commission of a crime.

3. An accomplice is also a person who knowingly, by whatever means, plans, incites the commission, orders or assists and encourages the planning, preparation or commission of a crime.

d. Combined proposal covering both: (b) principle of criminal responsibility and (c) participation/complicity

1. The following shall be considered perpetrators or participants of the crimes defined in the present Statute:

(a) Those who agree or prepare its perpetration;

(b) Those who commit such crimes;

(c) Those who jointly commit such crimes;

(d) Those who commit such crimes by means of a third person;

(e) Those who order intentionally a third person to perpetrate such crimes;

(f) Those who assist intentionally others in the perpetration of such crimes;

(g) Those who intervene without prior agreement with other persons in the perpetration of such crimes, when it is not possible to determine the result that each one produced.

2. The persons mentioned above will be liable in proportion to their responsibility.

e. Irrelevance of official position

Proposal 1

[1. This Statute shall be applied to all persons without any discrimination whatsoever.] The official position of a person who commits a crime under this Statute, in particular whether the person acts as Head of State or of Government or as a responsible government official, shall not relieve that person of criminal responsibility nor mitigate punishment.

2. Immunity

In the course of investigations or procedures performed by, or at the request of the court, no person may make a plea of immunity from jurisdiction irrespective of whether on the basis of international or national law.

Proposal 2

Official capacity of the accused

1. The official capacity of the accused, either as Head of State or Government, or as a member of a Government or parliament, or as an elected representative, or as an agent of the State shall in no case exempt him from his criminal responsibility under this Statute, nor shall it constitute a ground for reduction of the sentence.

2. The special procedural rules, the immunities and the protection attached to the official capacity of the accused and established by internal law or by international conventions or treaties may not be used as a defence before the Court.

Article C

Command responsibility

Responsibility of [commanders] [superiors] 13/ for acts of [forces under their command] [subordinates]

[In addition to other forms of responsibility for crimes under this Statute, a [commander] [superior] is criminally responsible] [A [commander]

13/ A significant question is whether the principle of command responsibility should be restricted to military commanders or be extended to any superior regarding the actions of subordinates.

[superior] is not relieved of responsibility] [A [commander] [superior] shall be regarded as the perpetrator] 14/ --

for crimes under this Statute committed by [forces] [subordinate[s]] under his or her command [and effective control] 15/ as a result of the [commander's] [superior's] failure to exercise proper control where:

(a) The [commander] [superior] either knew, or [owing to the widespread commission of the offences should have known] [should have known] 16/ that the [forces] [subordinate[s]] were committing or intending to commit such crimes; 17/ and

(b) The [commander] [superior] failed to take all necessary [and reasonable] measures within his or her power to prevent or repress their commission [or punish the perpetrators thereof]. 18/

Article D

Non bis in idem

Proposal 1

No person shall be tried before any other court for acts constituting a crime of the kind referred to in article 20 for which that person has already been tried by the Court.

Proposal 2

1. Once convicted or acquitted by a final judgement of the Court, a person may no longer be accused on the basis of the same evidence, even for a

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14/ The alternatives highlight the major question under this article of whether command responsibility is a form of criminal responsibility in addition to other modes of participation and complicity, or whether it is a principle that commanders are not immune for the acts of their subordinates. Option 1 takes the former approach, while option 2 takes the latter approach. Option 3 treats the commander as a principal.

15/ A question arises as to whether the commander must have a certain level of de facto control over subordinates at the time of the crime before a duty to act arises.

16/ Alternatively, "had reason to know" could be substituted for "should have known".

17/ The major questions raised by the alternatives are (a) what level of knowledge or foresight is required with respect to actions of subordinates; and (b) what should be the subject of this knowledge.

18/ Questions arise as to what type of action, the failure of which leads to liability, should be required of the commander (e.g. necessary or reasonable measures to prevent, repress or punish)? In addition, should the imposition of punishment by the commander alone be sufficient to relieve a commander of responsibility for crimes committed by a subordinate, which the commander could have but failed to prevent?

different offence, either by the organs of the Court or by the judicial authorities of the States parties.

2. However, if new evidence is made known to the prosecutor following acquittal, he may institute new proceedings.

[Note. The insertion of the above text does not intend to cover all the matters encompassed by article 42 of the Statute of the International Law Commission, but only those pertaining to the principle of non bis in idem stricto sensu, as it does not address the possible application of this principle by the international criminal court in relation to decisions of national courts. It was noted that this aspect was linked to questions of complementarity and procedure, although some delegations had the view that it belonged in the chapter on general principles.]

Article E

Age of responsibility

Proposal 1

1. A person under the age of [twelve, thirteen, fourteen, sixteen, eighteen] at the time of the commission of a crime [shall be deemed not to know the wrongfulness of his or her conduct and] shall not be criminally responsible under this Statute, [unless the Prosecutor proves that the person knew the wrongfulness of his or her conduct at that time].

2. [A person who is between the age of [sixteen] and [twenty-one] at the time of the (alleged) commission of a crime shall be evaluated (by the Court) as to his or her maturity to determine whether the person is responsible under this Statute.]

Proposal 2

Age of persons liable to punishment

[Persons aged 13 to 18 years at the time of the facts shall be criminally responsible but their prosecution, trial and sentence and the regime under which they serve their sentence may give rise to the application of special modalities specified in this Statute.]

[Note. Different views exist among States as to a specific age of responsibility.

It was observed that many international conventions (such as the International Covenant on Civil and Political Rights, the European Convention on Human Rights, the Inter-American Convention on Human Rights) prohibit the punishment of minors.

The question arising from the draft proposals was whether an absolute age of responsibility should be mandated or whether a presumptive age should be included with a means to rebut the presumption.

It was observed that a consistent approach (in terms of either an evaluation by the Court or proof by the Prosecutor) should be taken in paragraphs 1 and 2 of proposal 1 in respect of both of the age groups mentioned.

A question was raised as to what would be the criteria of the evaluation process, and should this be left for the Court to develop in supplementary rules or by jurisprudence?

It was questioned whether the Statute should specify that mitigation of sentence should or could be appropriate for those minors who were found to be mature enough to be criminally responsible.

It was observed that, in its article 1, the Convention on the Rights of the Child, defines as a child every human being younger than eighteen years of age and that, in its article 37, it lays down a series of limitations as regards the applicable penalties, ruling out the death penalty and life imprisonment without parole.]

Article F

Statute of limitations

Proposal 1

[1. The period of limitations shall be completed upon the lapse of xx years for the offence of ..., and yy years for the offence of ...

2. The period of limitations shall commence to run at the time when criminal conduct has ceased.

3. The period of limitations shall cease to run on the institution of the prosecution against the case concerned to this Court or to a national court of any State that has jurisdiction on such case. The period of limitations begins to run when the decision of the national court becomes final, where this Court has jurisdiction over the case concerned.]

Proposal 2

[There is no statute of limitations for those crimes within the [inherent] jurisdiction of the [Tribunal].]

Proposal 3

[There is no statute of limitations for those crimes within the [inherent] jurisdiction of the Court; but [for those crimes not within the Court's inherent jurisdiction] the Court may decline to exercise jurisdiction if, owing to the lapse of time, a person would be denied a fair trial.]

Proposal 4

[Crimes not subject to limitation

The crimes referred to in articles 27 19/ (a), (b) and (c) shall not be subject to limitation.

19/ Paragraphs (a), (b) and (c) of article 27 deal, respectively, with the crime of genocide, crimes against humanity and the crime of aggression.

Crimes subject to limitation

1. Proceedings before the Court in respect of the crimes referred to in articles 27 20/ (d) and (e) shall be subject to a period of limitation of 10 full years from the date on which the crime was committed, provided that during this period no prosecution has been brought.

2. If a prosecution has been initiated during this period, either before the Court or in a State competent to bring a prosecution under its internal law, the proceedings before the Court shall not be subject to limitation until 10 full years have elapsed from the date of the most recent prosecution.

Proposal 5

[1. The statute of limitations as established hereunder shall extinguish the criminal prosecution and the punishment.

2. The statute of limitations will be [ ] years and shall commence to run as follows:

(a) In case of instantaneous crime, from the moment of its perpetration;

(b) In case of attempt, from the moment the last act of execution was performed or the due conduct was omitted;

(c) In case of permanent crime from the moment of the cessation of the criminal conduct.

3. The statute of limitations may be interrupted by the actions taken in the investigation of the crime and its perpetrators. If those actions were stopped, the statute of limitations will run again as of the day the last act of investigation was carried out.

4. The statute of limitations for definitive sanctions will run as of the moment the condemned person escaped and will be interrupted with its detention.]

20/ Paragraphs (d) and (e) of article 27 deal, respectively, with serious violations of the laws and customs applicable in armed conflicts and with grave breaches of the four 1949 Geneva Conventions and of article 3 common to the four 1949 Geneva Conventions.]

Article G

Actus reus (act and/or omission)

Proposal 1

Physical elements of crime

1. Conduct for which a person may be criminally responsible and liable for punishment as a crime under this Statute can constitute either an act or an omission, or combination thereof. 21/

2. For the purposes of paragraph 1, a person may be criminally responsible and liable for punishment for an omission if:

(a) The omission is specified in the description of the crime, and the person could have, but [intentionally or knowingly] failed to avoid the omission; or

(b) In the circumstances

(i) a. the person is under a [pre-existing] legal obligation (duty) to avoid the consequences specified as an [constituent; material] element in the description of a crime;

[Alternative: (i) a. the person is under a [pre-existing] legal obligation (duty) to avoid the result of a crime;]

b. [or The person is responsible for having created a particular risk or danger that subsequently led to the crime]

(ii) The consequence caused [result realized] by the omission corresponds to the consequence [result] that would be caused [realized] by a commission of such crime by means of an act; and

(iii) The person could have, but [intentionally or knowingly] failed to avoid the consequences [results] of such crime.

[3. A person is only criminally responsible under this Statute if the harm required for the commission of a crime is caused by and accountable to the principal's (perpetrator's) act or omission (conduct).]

[Note. The concept of "omission" presents particular problems to various legal systems.

The extent to which the concept of omission could raise the question of liability may be considered.

Delegations may wish to omit these two elements [i.e., omissions and causation] from the statute.

21/ New proposal. This paragraph would link the concepts of act and omission with the concept of "conduct" to which reference is made in article 33-4, and would provide a conceptual link for paragraph 2 of article 33-5.

Regarding paragraphs 2 (a) and (b) (iii), it was questioned whether references to "intentionally or knowingly" were necessary in view of the subsequent article concerning mental elements, which requires proof of intent or knowledge as the general rule. On the other hand, it was noted that it should be made clear that a failure to avoid an omission due to negligence is insufficient for criminal liability, thereby, possibly justifying the retention of these words.

Regarding paragraph 2 (b) (ii), a question was raised as to the origin of the legal obligation or duty to avoid the consequences or result of a crime. Does this obligation arise only by way of the Statute, or might the obligation arise by virtue of other sources of international or national law? Should it be clarified that any legal obligation must be an obligation pursuant to the Statute?

Also regarding paragraph 2 (b), the draft proposals raise the question whether the obligation is to avoid the "consequences" specified in the definition of the crime or to avoid the "result" of a crime (which may be a broader concept and may include crimes of conduct that have no separate consequences)?

Regarding paragraph 3, it was questioned whether the draft should specify that the "act or omission" be voluntary. Others thought that this was not necessary, as voluntariness was addressed by the principles concerning mental elements in article H.

A question was raised as to whether liability in respect of omissions should be limited only to specific crimes as defined by the Statute [see proposals concerning command responsibility].]

Proposal 2

Omission

A person who fails to avoid the result of an offence is responsible for such offence if:

(a) He/she is under a legal obligation to avoid such result;

(b) The degree of the unlawfulness realized by such omission corresponds to that of the unlawfulness to be realized by the commission of such offence; and

(c) He/she could have avoided such result.

[Note. It was suggested that the Committee might wish to include in the Statute the classification of instantaneous and permanent crimes.]

Article H

Mens rea

Mental elements of crime

Proposal 1

1. Unless otherwise provided, a person is only criminally responsible and liable for punishment for a crime under this Statute if the physical elements are committed with intent [or] [and] knowledge [, whether general or specific or as the substantive crime in question may specify].

2. For the purposes of this Statute and unless otherwise provided, a person has intent where:

(a) In relation to conduct, that person means to engage in the act or omission;

(b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.

3. For the purposes of this Statute and unless otherwise provided, "know", "knowingly" or "knowledge" means:

(a) To be aware that a circumstance exists or a consequence will occur; or

(b) [To be aware that there is a substantial likelihood that a circumstance exists and deliberately to avoid taking steps to confirm whether that circumstance exists] [to be wilfully blind to the fact that a circumstance exists or that a consequence will occur.]

[4. For the purposes of this Statute and unless otherwise provided, where this Statute provides that a crime may be committed recklessly, a person is reckless with respect to a circumstance or a consequence if:

(a) The person is aware of a risk that the circumstance exists or that the consequence will occur;

(b) The person is aware that the risk is highly unreasonable to take; [and]

[(c) The person is indifferent to the possibility that the circumstance exists or that the consequence will occur.]

[Note. The concepts of recklessness and dolus eventualis should be further considered in view of the seriousness of the crimes considered.

Therefore, paragraph 4 would provide a definition of "recklessness", to be used only where the Statute explicitly provides that a specific crime or element may be committed recklessly. In all situations, the general rule, as stated in paragraph 1, is that crimes must be committed intentionally and knowingly.

It was questioned whether further clarification might be required to the above definitions of the various types and levels of mental elements. It was noted that this could occur either in the General Part, in the provisions defining crimes or in an annex.

It was questioned whether it was necessary in paragraph 1 to make reference to general and specific intent, as in either case the general rule would be that intent or knowledge is required.

Likewise, it was noted that any reference to "motive" should not be included; if relevant, motive or purpose would be an integral element of the definition of a crime.]

Proposal 2

At the time of a conduct, if a person is not aware of the facts constituting an offence, such conduct is not punishable.

Proposal 3

Moral element

There cannot be a crime without the intention to commit it.

Article I

Attempt

Proposal 1

1. A person is criminally responsible and is liable for punishment for attempting to commit a crime if, with the intent to commit that crime, the person

> [engages in conduct for the purpose of carrying out that intent which is more than mere preparation to commit the crime]
>
> [engages in conduct constituting a substantial step towards the accomplishment of such crime]
>
> [or concludes all necessary steps within the person's control and according to his or her plan towards execution of the crime]
>
> [commences execution of the crime]

, but fails to complete the commission of the crime due to [circumstances independent of that person's will] [or a fortuitous event], [or the object of the attempt is impossible to achieve].

[2. A person shall only be criminally responsible for attempting to commit a crime where so provided in this Statute.]

3. A person who is criminally responsible for attempting to commit a crime may be liable to [a reduced punishment] [a reduced period of imprisonment].

[4. If the person abandons his or her efforts to commit the crime or otherwise prevents the accomplishment of the crime, the person is not punishable if the person completely and voluntarily has given up his or her criminal purpose before the crime was committed.] [without prejudice to applying the penalties to acts committed or omitted that constitute by themselves crimes.]

[Note. With regard to paragraph 4 above, it was noted that some jurisdictions do not recognize "abandonment" as a defence. Questions were raised whether the concept of "abandonment" should be included in the definition of "attempt", or should be dealt with separately in the statute.

It was observed that an intervening event might break the chain of causation.

It was observed that the three alternatives in paragraph 1 were not mutually exclusive and could be combined as: "commences execution of the crime by engaging in conduct for the purpose of carrying out that intent, which is more than mere preparation and constitutes a substantial step towards the accomplishment of such crime".

It was questioned whether the three proposed reasons in paragraph 1 for the failure to complete the commission of a crime were mutually exclusive, or could be combined.

It was observed that the offence of attempt could apply generally to all crimes.

A question was raised as to when mitigation of punishment for an attempt was appropriate and whether such mitigation should only be for certain crimes.]

Proposal 2

Commission and attempted commission

[1. The perpetrator of a crime is the person who commits or attempts to commit it.

2. A crime is attempted when its commission has been commenced and has been interrupted or ceased to have effect only owing to circumstances beyond the control of the perpetrator. The commencement of the commission of a crime is characterized by one or more acts which must have the direct consequence of commission of the crime when the crime has entered its period of commission.]

[Article J

Conspiracy

1. A person is criminally responsible and is liable for punishment for conspiracy if that person, [with the intent to commit a specific crime] agrees with one or more persons to perpetrate that crime [or that a common intention to commit a crime will be carried out] and an overt act is committed by that person [or by another party to the agreement] [for the purpose of furthering the agreement] [that manifests the intent].

2. A person is guilty of conspiracy even if the object of the conspiracy is impossible or is prevented by a fortuitous event.

3. A person shall only be criminally responsible for conspiracy in respect of a crime where so provided in this Statute.

4. A person who is criminally responsible for conspiracy is liable for the same punishment as the person who committed or would have committed the crime as a principal.]

[Note. See also article 6.1 of the Rwanda Statute.

It was noted that there were conceptual differences concerning conspiracy among the different legal systems.

The question was raised whether a "planner" should be punished when the crime was not completed, yet action had been taken to implement the plan.

Some delegations questioned whether this concept should be included in the General Part of the Statute, although it might be necessary to punish such conduct in cases of exceptionally serious crimes. (Delegations are invited to look at the explanatory note contained in pages 76 and 77 of document A/AC.249/1.)

Others thought that it would be retrogressive not to include it since it was a form of liability at the Nuremberg trials.

It was questioned whether, in the situation where the crime agreed upon is actually committed, would the crime of conspiracy merge with the completed crime or remain a distinct and separate crime? If the conspiracy were merged with the completed crime, should a conspirator also be responsible for other foreseeable crimes that may have been committed in carrying out the conspiracy? (If the conspiracy remained a distinct crime, the conspirator would only be responsible (absent any other mode of participation) for a conspiracy to commit the crime that was agreed to be committed, as this is the subject-matter of the unlawful agreement.)

Questions arising from the proposed drafts include: (a) whether the accused conspirator must have an intent to commit the crime or whether it is sufficient that there is an intention that a crime be carried out and that others might be the actual committers; (b) whether the accused conspirator must commit the overt act or whether it is sufficient if one of the other co-conspirators commits the overt act; (c) what must be the nature of the overt act (e.g. the act is undertaken for the purpose of furthering the agreement or must it actually manifest the agreement); (d) whether a conspiracy exists even if the object of the conspiracy is factually impossible to achieve; (e) whether conspiracy should be limited in respect of an agreement to commit certain listed crimes; and (f) the appropriate punishment for the crime.]

Article K

Mistake of fact [or law]

Proposal 1

Mental element

1. At the time of a conduct, if a person is not aware of the facts constituting an offence, such conduct is not punishable.

2. Even if a person, at the time of a conduct, does not realize its unlawfulness, he/she is criminally responsible in the case unless such error is unavoidable; provided that the sentence may be reduced.

Proposal 2

Mistake of fact [or of law]

Invincible [Unavoidable] mistake of fact [or of law] shall be a defence provided that the mistake is not inconsistent with the nature of the alleged crime. Avoidable mistake of fact [or of law] may be considered in mitigation of punishment.

Proposal 3

1. [A mistake of law or] a mistake of fact shall be a defence if it negates the mental element required by the crime charged provided that said mistake is not inconsistent with the nature of the crime or its elements, and provided that the circumstances he reasonably believed to be true would have been lawful.

[2. The person who commits a crime in the mistaken belief that he is acting lawfully is not punishable, provided that he has done everything under the circumstances which could reasonably be demanded of him to inform himself about the applicable law. If he could have avoided his mistake of law, the punishment may be reduced.]

Proposal 4

Mistake of law

Mistake of law may not be cited as a ground for exemption from criminal responsibility.

[Note. Some delegations expressed doubts over including these concepts in the Statute.

Doubts were also expressed as to whether these concepts are negations of responsibility or a defence.

In view of the proposed statutory requirements for the existence of particular mental elements in order to establish criminal responsibility (see articles B (b) and H), it was questioned whether this defence need be explicitly mentioned as it is merely one example of the various factors that could negate the existence of the required mental element.

Some delegations held the view that mistake of law should not be permitted as a defence.]

Article L

Insanity/Diminished mental capacity

Proposal 1

1. A person is not criminally responsible [is legally insane] if at the time of that person's conduct that (would otherwise) constitutes a crime, the person suffers from a mental disease or mental defect that results in the person lacking substantial capacity either to appreciate the criminality [unlawfulness] of his or her conduct or to confirm his or her conduct to the requirements of the law [, and such mental disease or mental defect caused the conduct constituting a crime.]"

2. Where a person does not lack substantial capacity of the nature and degree mentioned in paragraph 1, but such capacity is nevertheless substantially diminished at the time of the person's conduct, the sentence shall [may] be reduced."

[Note. The question was raised whether this defence should be included.

The question was also raised whether a provision was required to deal with the issue of whether the accused is fit to stand for trial. That provision might be included in the chapter on trial/procedural rules.

The question was raised as to what should happen to a person who is found insane. Should the person be released or be detained in a mental institution? If the latter, where? Should provision for this be made in the articles concerning enforcement of sentences by the Court and States Parties?

It was observed that this defence might be more relevant for some crimes (e.g. a war crime, such as killing of a prisoner of war) than for others (e.g. crimes involving the formulation of policy, such as genocide). If the defence is included, possibly it should be available only for some types of crimes?]

Proposal 2

Mental disorders

1. A person who, at the time of the facts, was suffering from a mental or neuropsychic disorder that destroyed his judgement or his control over his actions shall not be criminally responsible.

2. When the mental or neuropsychic disorder from which the person was suffering at the time of the facts merely altered his judgement or impeded his control over his actions without destroying such judgement or control, he shall remain criminally responsible. However, the Court shall take such circumstances into account in determining the sentence and the regime under which it shall be served.

Article M

Intoxication

Proposal 1

A person is intoxicated or in a drugged condition when under the effect of alcohol or drugs at the time of the conduct that would otherwise constitute a crime he is unable to formulate the mental element required by said crime. Such a defence shall not apply to a person who engages in voluntary intoxication with the pre-existing intent to commit a crime. With respect to crimes requiring the mental element of recklessness, voluntary intoxication shall not constitute a defence.

[Note. The point was made that there were essentially two questions:

(a) Whether intoxication should be available as a defence or as a negation of *mens rea*; and

(b) If available as a defence, should it be spelled out in the Statute or elaborated in another way (see section B below).

It was observed that this defence might be relevant for some individual crimes (e.g. a war crime, such as killing a prisoner of war). On the other hand, it was observed that it might be better to leave this defence to be resolved by the Court through its jurisprudence rather than to include such a defence in the Statute.

It was also observed that intoxication is merely a factor relevant to the existence of, or which may negate, a required mental element. In light of the proposed statutory requirements for the existence of particular mental elements in order to establish criminal responsibility (see articles B (b) and H), it was questioned whether such a defence need be explicitly mentioned as it is merely an example of one factor that could negate the existence of the required mental element.

Differences exist among national legal systems as to how intoxication is addressed, and other formulations of a defence could equally be suggested.

If the defence is available (either expressly by the Statute or by the Court's jurisprudence), should it be limited to only certain crimes?]

Proposal 2

Voluntary drunkenness and narcotic intoxication

A state of drunkenness caused by the voluntary consumption of alcohol or a state of intoxication caused by voluntarily taking a narcotic product may in no case be regarded as grounds for exemption from criminal responsibility.

Article N

Self-defence/defence of others/defence of property

Proposal 1

Self-defence and defence of others

1. A person [is not criminally responsible and] is not liable for punishment if that person acts in self-defence or in defence of others.

2. A person acts in self-defence, or in defence of others, if the person acts [reasonably] [and as necessary] [with the reasonable belief that force is necessary] to defend himself or herself, or another person, against a[n] [reasonable apprehension of] [imminent] [present] unlawful force or threatened unlawful force, [in a manner which is reasonably proportionate to the threat or use of force].

[3. Self-defence, in particular defence of property, shall not exclude punishment if it causes damage disproportionate to the degree of danger involved or the interest to be protected by the defensive act].

[4. If a person exceeds the limits of the justifiable defence as described in paragraph 2, the sentence may be reduced.]

[Note. Several questions were raised: (a) whether a provision relating to defence of property should be included in the Statute; (b) whether self-defence should be used as a defence in response to a threat of unlawful force; (c) whether pre-emptive self-defence is valid; (d) whether self-defence should be limited to certain types of crimes under article 20; and (e) whether or not self-defence should be allowed in specific cases, at the discretion of judges.

Other questions raised by the draft include the extent to which the availability of the defence should be limited by requirements of reasonableness, necessity and/or proportionality.

The question also arises as to whether the defence should be available only if the defensive action is actually necessary or whether it is sufficient if the accused, although honestly mistaken, reasonably believes that the defensive action is necessary.

The degree of responsibility and punishment for excessive use of force in self-defence also arises as an issue.]

Proposal 2

Legitimate defence

1. A person who, in the face of an unjustified attack on himself or another person, carries out at that same time an act dictated by the necessity of legitimate self-defence or defence of another person shall not be criminally responsible except when the means of defence use is incommensurate with the seriousness of the attack.

2. The argument of legitimate defence cannot be accepted when the unjustified attack which the person cites in accordance with the preceding paragraph constitutes only an attack on property.

Article O

Necessity

Proposal 1

1. A person [is not criminally responsible and] is not liable for punishment if that person acts due to necessity.

2. A person acts due to necessity if:

(a) [The person reasonably believes that] there is a threat of [imminent] [present] [or otherwise unavoidable] death or serious bodily harm to [or a threat to the freedom of] that person or another person;

[alternative: (a) Circumstances beyond a person's control are likely to create an unavoidable private or public harm];

(b) [The person acts reasonably to avoid the threat] [there exists no other way to avoid the threat]; (and)

(c) [The person acts only to avoid greater imminent harm] [the interests protected by such conduct exceed the interest infringed by such conduct].

[3. This defence does not include the use of deadly force.]

[4. A person does not act due to necessity if [the circumstances are (within) not beyond a person's control] [(or if) that person knowingly and without reasonable excuse has exposed himself or herself to the circumstances creating the necessity].]

[5. If a person exceeds the limitation of the justifiable defence as described in paragraph 2 [this article], the sentence may be reduced.]

[Note. The question was raised as to the crimes to which the defence of necessity might apply.

The question was also raised whether the defence of necessity should include the use of deadly force.

It was questioned whether the defence of necessity should apply to the crimes of genocide and crimes against humanity.

Other questions arising from the proposed drafts include: (a) the degree of immediacy of the threat (e.g. present, imminent or otherwise unavoidable); (b) the nature of the threatened harm to be avoided (e.g. serious bodily harm, death, freedom, or private or public harm); (c) whether the defence should be available only if the threat actually exists or whether it is sufficient if the accused, although honestly mistaken, reasonably believes that the threat exists; (d) whether the accused need only act reasonably to avoid the threat if there is more than one equally harmful means of avoidance or must there be no other way to avoid the threatened harm other than by the accused's acts; (e) the necessity for proportionality between the harm to be avoided and the harm caused by the accused; and (f) what factors (such as voluntary exposure to the risk or control of circumstances) should deny the availability of the defence, and whether these are mutually exclusive or could be conjunctive.]

Proposal 2

1. A conduct done, in the present danger for life, body or freedom to avoid such danger of himself/herself or any other person, is not punishable, if (a) there exists no other way to avoid such danger, and (b) the interest protected by such conduct exceeds the interest infringed by such conduct.

2. If a person exceeds the limitation of justifiable defence of paragraph 1, the sentence may be reduced.

Article P

Duress/Coercion

1. A person [is not criminally responsible and] is not liable for punishment if the person acts under duress or coercion.

2. A person acts under duress or coercion if:

[(a) [[the person reasonably believes that] there is a threat of [imminent] [present] [or otherwise unavoidable] [unlawful] force or use of such force against that person or another person];

[(a) [the person reasonably believes that] there is a threat of [imminent] [present] [or otherwise unavoidable] death or serious bodily harm to that person or another person];

(b) [the person acts reasonably in response to that threat] [the threat could not reasonably have been resisted by [an ordinary] [the] person]; and

[(c) the coerced conduct does not produce a greater harm than the one likely to be suffered (sought to be avoided) and is not likely to produce death].

[3. A person does not act under duress or coercion if that person knowingly and without reasonable excuse has exposed himself or herself to that duress or coercion].

[Note. Questions arising from the proposed drafts include: (a) the degree of immediacy of the threat (e.g. present, imminent or otherwise unavoidable); (b) the nature of the threatened harm to be avoided (e.g. force serious bodily harm, death), and whether it need be unlawful; (c) whether the defence should be available only if the threat actually exists or whether it is sufficient if the accused, although honestly mistaken, reasonably believes that the threat exists; (d) whether the accused need only act reasonably to avoid the threat or whether no reasonable person could have resisted the threat; (e) the necessity for proportionality between the harm to be avoided and the harm caused by the accused; (f) whether causing death is a permitted response to a threat; and (g) what factors (such as voluntary exposure to the risk) should deny the availability of the defence.]

Article Q

Superior orders

Proposal 1

1. The fact that a person acted pursuant to an order of a Government or of a superior, [whether military or political] shall not relieve the person of criminal responsibility [if the order appears to be manifestly unlawful] [and the person has a greater risk to himself or herself no alternative but to obey, or has no other moral choice].

2. Where the person has acted pursuant to an order of a government or of a superior in the circumstances as described in paragraph 1, the sentence may be reduced having regard to the circumstances [this fact may be considered in mitigation of punishment if the court determines that justice so requires].

[Note. Three questions were raised:

(a) Should those troops who obey what appears to them at the time to be a manifestly lawful order, be criminally responsible if it transpires that their commander was acting illegally in giving the order?

(b) Should those troops who receive an order which is not manifestly lawful but simply lawful, be criminally responsible if it transpires that their commander was acting illegally in giving the order, and if they should have made further inquiries before obeying the order?

(c) What rules of law govern the legality or otherwise of an order? It was also suggested that the defence not apply to the crimes of genocide and crimes against humanity. Should the defence be limited to only some types of crimes?]

Proposal 2

Prescription by law, and orders of the legitimate authority

1. With regard to genocide, crimes against humanity and the crime of aggression, the perpetrator of or accomplice in one of these crimes may not be exempted from his criminal responsibility by the sole fact that he carried out an act prescribed or authorized by legislation or regulations or an act ordered by the legitimate authority. However, the Court shall take this circumstance into account when determining the sentence and its severity.

2. With regard to the crimes referred to in articles 31 and 32, [22] a person who carries out an act ordered by the legitimate authority shall not be criminally responsible except when such an act is manifestly illegal or in conflict with the rules of international law applicable in armed conflicts or with duly ratified or approved international conventions.

3. However, persons who have carried out acts ordered by the Security Council or who have acted on its behalf and in accordance with a mandate issued by it shall not be criminally responsible and may not be prosecuted before the Court.

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[22] Articles 31 and 32 deal, respectively, with "serious violations of the laws and customs of wars" and with "grave breaches of the Geneva Conventions".

[Article R

Possible defences specifically referring to war crimes and grave breaches of the Geneva Conventions of 1949

Such defences might include:

- Military necessity;
- Reprisals.]

[Note. It was questioned whether defences under public international law should be included in the General Part of the Statute, since they to a large extent relate to inter-state relations. It was also questioned which set of rules governing reprisals should apply.

As regards the question of Article 51 of the Charter of the United Nations, it was suggested that a savings clause could be included in reference to the rights and duties of States under the Charter and the functions and powers of the principal organs of the United Nations under the Charter. Such a clause should not necessarily be in a chapter on General Principles.

It was questioned whether such defences could be dealt with in connecting with the definition of war crimes and grave breaches of the Geneva Conventions of 1949.]

Article S

Exhaustive or enumerative list of defences

Proposal 1

Other defences

1. At trial the Court may consider a defence not specifically enumerated in this chapter if the defence:

(a) Is recognized [in general principles of criminal law common to civilized nations] 23/ [in the State with the most significant contacts to the crime] 24/ with respect to the type of conduct charged; and

(b) Deals with a principle clearly beyond the scope of the defences enumerated in this chapter and is not otherwise inconsistent with those or any other provisions of the Statute.

2. If an accused wishes to raise such a defence, he must notify the Court and the Prosecutor a reasonable time prior to trial. The Court shall give the Prosecutor the opportunity to be heard and shall issue an order deciding the matter. An accused who has failed to provide adequate notice shall be precluded

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23/ This text represents the approach of Article 38 (c) of the Statute of the International Court of Justice.

24/ This approach draws upon principles applied in international private law matters and would presumably require the Court to craft a test for determining which State's contacts are most significant.

from asserting the defence at trial; except that, where compelling circumstances exist, the Court may instead grant the Prosecutor a reasonable postponement to prepare for the issue at trial. 25/

3. Denial of a request under this article shall not preclude an accused from seeking consideration of the basis of the asserted defence as a grounds for mitigation of punishment to the extent otherwise permitted by this Statute.

Proposal 2

The Court shall determine the admissibility of reasons excluding punishment in view of the character of each crime.

[Note 1. Different views were held as to whether the finally agreed upon list of defences in the Statute should be exhaustive or enumerative. This leads to the question under section B below.]

[Note 2. It was noted that if the nature of a defence was really the negation of a mental element, there was no need to specify that defence in the Statute. Further, it could be applicable by means of the savings clause as proposed in this article.]

Article T

Presumption of innocence

An accused shall be presumed innocent [until] [unless] [proved guilty] [convicted] in accordance with [this Statute] [law]. [The onus is on the prosecutor to establish the guilt of the accused [beyond reasonable doubt].]

[Note 1. The presumption of innocence is also a procedural matter.]

[Note 2. Presumption of innocence [also] constitutes a substantive right of the accused.]

SECTION 2. FURTHER ELABORATION BY THE COURT OF GENERAL PRINCIPLES OF CRIMINAL LAW, INCLUDING THE QUESTION OF APPLICABLE LAW

[Note. The question was raised as to whether the Court should be empowered to elaborate/legislate further the general principles of criminal law that are not written in the Statute. (Please note that the draft ILC Statute contains a provision on this question in article 19.):

(a) If so, one of the possible solutions may be found in the proposal by one delegation concerning article 20 (*bis*), which reads as follows:

> "1. Subject to paragraphs 2 and 3, the judges may by absolute majority elaborate the elements of the crimes set out in article 20 and elaborate principles of liability and defence that are not otherwise set out in, and

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25/ The Rules of Procedure could provide further clarification regarding the conduct of any hearings required by the Court prior to ruling. The Statute or Rules might also permit interlocutory appeal by the Prosecutor of an adverse ruling.

that are not inconsistent with, the elements and principles in the Statute or in annex B. In elaborating elements and principles, the Court shall not create any new offences or crimes.

"2. The initial elements and principles elaborated by the Court shall be drafted by the judges within six months of the first elections for the Court, and submitted to a conference of States parties for approval. The judges may decide that an element or principle subsequently elaborated under paragraph 1 should also be submitted to a conference of States parties for approval.

"3. In any case to which paragraph 2 does not apply, elements or principles elaborated under paragraph 1 shall be transmitted to States parties and may be confirmed by the Presidency unless, within six months after transmission, a majority of States parties have communicated in writing their objections.

"4. An element or principle may provide for its provisional application in the period prior to its approval or confirmation. An element or principle not approved or confirmed shall lapse."]

[Note should be taken of the link to the choice of sources of law in connection with possible further elaboration of general principles of criminal law by the Court.

(b) It was stated by some delegations, however, that the Court should not be empowered to legislate general principles of criminal law. In this case, a possible solution is found in the proposal by another delegation on article 33, which reads:

"1. The Court shall apply this Statute.

"2. When the Court cannot find the necessary provision to be applied, the Court may apply:

(a) The national law of the State where the crime was committed;

(b) If the crime was committed in the territories of more than one State, the national law of the State where the substantial part of the crime was committed;

(c) If the laws of the States mentioned in (a) and (b) do not exist, the national law of the State of nationality of the accused, or if the accused does not have any nationality, the national law of the State of permanent residence of the accused; or

(d) If the laws of the States mentioned in (a), (b) and (c) do not exist, the national law of the State which had custody of the accused, as far as these laws are consistent with the objectives and purposes of this Statute."]

[Note should be taken of other proposals submitted on article 33, which are:

(a) Proposal submitted by one delegation

"1. The Court shall apply:

(a) The Statute, including annexes A and B, rules adopted pursuant to article 19, and elements of crimes and principles of liability and defence elaborated pursuant to article 20 bis;

(b) Applicable treaties and the principles and rules of general international law; and

(c) Principles of law developed by the Court from national law.

"2. In developing principles of law as referred to in paragraph 1 (c), the Court shall [conduct and] take into account [a survey of] the national laws of States representing the major legal systems of the world, where those laws are not inconsistent with international law and internationally recognized norms and standards.

"The Court shall only apply paragraph 1 (c) to the extent that a matter is not covered by paragraphs 1 (a) or (b)."

(b) Proposal submitted by another delegation

"The Court shall apply:

(a) Its Statute, including the annexes thereto;

(b) The other relevant rules of international law;

(c) General principles of criminal law identified by it and approved by States parties to the statute;

(d) Rules of national law, to the extent authorized by the Statute, and

(e) Its Rules of Procedure and Evidence."

(c) Proposal submitted by another delegation

"1. This Statute (and the rules promulgated thereunder) shall be the primary source of law for the Court.

"2. To the extent not inconsistent with the above, the Court may apply principles and rules of law that are generally recognized in national legal systems as a subsidiary source of law.

"3. To the extent not inconsistent with the above, the Court may apply specific rules of applicable national law, or applicable treaty provisions, where necessary to the determination of a specific question that is governed by such law or treaty, or where the application or interpretation of such specific law or treaty is in fact at issue in the case."]

Proposal submitted by another delegation

Applicable law

The Court shall apply:

(a) In the first place, this Statute and the treaties to which it makes reference;

(b) If necessary, the principles and rules of general international law;

(c) Failing that, and provided that such action does not conflict with the provisions mentioned above, the internal law of the State in whose territory the crime has been committed and, on a subsidiary basis, the internal law of the State of which the accused is a national.

Proposal submitted by still another delegation

The Court may apply principles and rules of law enunciated in its previous decisions.

[Note. Article 33 obviously has a bearing on many parts of the Statute. The fact that it is taken up here does not imply that it should be placed in the part dealing with the general principles of criminal law.

Delegations are invited to look at page 26 of document A/AC.249/L.4.

The question of penalties is not included in this document.]

PART 4. INVESTIGATION AND PROSECUTION*

Article 25

Complaint

I. ILC DRAFT

1. A State party which is also a Contracting Party to the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948 may lodge a complaint with the Prosecutor alleging that a crime of genocide appears to have been committed.

2. A State party which accepts the jurisdiction of the Court under article 22 with respect to a crime may lodge a complaint with the Prosecutor alleging that such a crime appears to have been committed.

3. As far as possible a complaint shall specify the circumstances of the alleged crime and the identity and whereabouts of any suspect, and be accompanied by such supporting documentation as is available to the complainant State.

4. In a case to which article 23 (1) applies, a complaint is not required for the initiation of an investigation.

II. PROPOSALS

A. Who can make a complaint

[1. A State Party which is also a Contracting Party to the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948, and any State Party may lodge a complaint [in writing] with the Prosecutor

- [alleging that a crime appears to have been committed.]

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* Note. The following is a compilation prepared by an informal group dealing with procedural questions, fair trial and rights of the accused covering parts 4, 5 and 6. It neither represents a text agreed upon among delegations nor suggests that every provision should be included in the Statute. It contains only written proposals. Proposals for some of the articles have been consolidated to various degrees by some of their authors and may not necessarily represent the views of all the delegations who submitted proposals. The order of the articles as well as the proposed content and headings are only of an indicative character and have not been finally agreed upon. The compilation does not prejudice discussion on other topics related to the establishment of an international criminal court.

Articles 25, 26, 27, 30, 32, 37, 40 to 43, 45, 46 and 48 to 50 have been consolidated to various degrees. Articles 28, 29, 34 to 36, 38 and 44 are only compilations of written proposals. Articles 31, 33, 39 and 47 are related to other issues and are not dealt with here.

A chart of written proposals on the articles dealing with procedural questions, fair trial and rights of the accused is contained in annex II to the present volume.

- [specifying that acts constituting crimes referred to in article 20 appear to have been committed.]

- [that refers a situation to the Prosecutor as to which such crime appears to have been committed and requesting that the Prosecutor investigate the situation for the purpose of determining whether one or more specific persons should be charged with commission of such crime.] 26/

2. A State Party [which accepts the jurisdiction of the Court under article 22 with respect to a crime] 27/ [which has jurisdiction over the crime, or of which a victim of the alleged crime is or was its national,] may lodge a complaint [in writing] with the Prosecutor

- [alleging that a crime appears to have been committed]

- [specifying that acts constituting crimes referred to in article 20 appear to have been committed]

- [that refers a situation to the Prosecutor as to which such crime appears to have been committed and requesting that the Prosecutor investigate the situation for the purpose of determining whether one or more specific persons should be charged with commission of such crime].

[2 bis. In a case to which article 23 (1) applies, a complaint is not required for the initiation of an investigation.] 28/

[2 bis. Notwithstanding article 21, the Security Council, acting under Chapter VII of the Charter of the United Nations, can decide to refer a [matter] [situation or acts constituting crimes] to the Prosecutor when one or more of the crimes referred to in article 20 appear to have been committed.]

[2 ter. Notification of the Security Council decision to the Prosecutor shall be accompanied by all evidence available to the Council.]

[2 quat. The Prosecutor shall initiate investigations *ex officio* or on the basis of information obtained from any source, particularly from Governments, United Nations organs, intergovernmental and non-governmental organizations. The Prosecutor shall assess the information received or obtained and decide whether there is sufficient basis to proceed.]

26/ Depending upon which crimes will be within the inherent jurisdiction of the Court or whether all crimes will be treated in the same manner in terms of preconditions to the exercise of jurisdiction (see article 21), paragraph 1 could be expanded to include other crimes or be deleted.

27/ An alternative would be to require at least one other State party which accepts the jurisdiction of the Court under article 22 with respect to the same crime to join in the complaint and affirm that in their joint opinion the crime is a most serious one of interest to the international community as a whole.

28/ This paragraph is former paragraph 4 of article 25 of the ILC draft.

B. Contents of a complaint

3. As far as possible a complaint shall [specify] [provide as much information as possible to assist the Prosecutor in deciding whether an investigation should be initiated, including]:

(a) [the facts which indicate] the basis of jurisdiction relied upon in making the complaint;

(b) the specific crime or crimes within the jurisdiction of the Court, which the complainant State believes has been committed;

(c) the circumstances of the alleged crime;

(d) the identity and location of any persons suspected of committing such crime, [if known];

(e) the identity and location of any witnesses, if known;

(f) a description of evidence or believed sources of evidence pertinent to the investigation; and

(g) whether the complaint State, or other States to its knowledge, may be investigating or prosecuting the matter, and the details of such investigation or prosecution;

and be accompanied by such supporting documentation as is available to the complaint State. The complainant State may request or the Prosecutor may require that the complaint or any part thereof remain confidential pending the Prosecutor's review.

3 bis. The Prosecutor may seek clarification of any matter contained in the complaint or further information from the complainant State Party.

C. Miscellaneous

4. 29/ The Prosecutor shall inform the Security Council of all complaints lodged under this article.

29/ Former ILC paragraph 4 has been moved to paragraph 2 bis.

Article 26

Investigation of alleged crimes

I. ILC DRAFT

1. On receiving a complaint or upon notification of a decision of the Security Council referred to in article 23 (1), the Prosecutor shall initiate an investigation unless the Prosecutor concludes that there is no possible basis for a prosecution under this Statute and decides not to initiate an investigation, in which case the Prosecutor shall so inform the Presidency.

2. The Prosecutor may:

(a) request the presence of and question suspects, victims and witnesses;

(b) collect documentary and other evidence;

(c) conduct on-site investigations;

(d) take necessary measures to ensure the confidentiality of information or the protection of any person;

(e) as appropriate, seek the cooperation of any State or of the United Nations.

3. The Presidency may, at the request of the Prosecutor, issue such subpoenas and warrants as may be required for the purposes of an investigation, including a warrant under article 28 (1) for the provisional arrest of a suspect.

4. If, upon investigation and having regard, inter alia, to the matters referred to in article 35, the Prosecutor concludes that there is no sufficient basis for a prosecution under this Statute and decides not to file an indictment, the Prosecutor shall so inform the Presidency giving details of the nature and basis of the complaint and of the reasons for not filing an indictment.

5. At the request of a complainant State or, in a case to which article 23 (1) applies, at the request of the Security Council, the Presidency shall review a decision of the Prosecutor not to initiate an investigation or not to file an indictment, and may request the Prosecutor to reconsider the decision.

6. A person suspected of a crime under this Statute shall:

(a) prior to being questioned, be informed that the person is a suspect and of the rights:

(i) to remain silent, without such silence being a consideration in the determination of guilt or innocence; and

(ii) to have the assistance of counsel of the suspect's choice or, if the suspect lacks the means to retain counsel, to have legal assistance assigned by the Court;

(b) not be compelled to testify or to confess guilt; and

(c) if questioned in a language other than a language the suspect understands and speaks, be provided with competent interpretation services and with a translation of any document on which the suspect is to be questioned.

II. PROPOSALS

A. Conditions for the Prosecutor to initiate an investigation [and review of Prosecutor's decision]

1. On receiving a complaint [under article 25] or upon notification of a decision of the Security Council referred to in article 23 (1) [or upon any other substantiated information] the Prosecutor shall:

[(a) notify the States Parties of any matter submitted to the Court in accordance with [French articles 37 and 38] and those States Parties shall so inform the persons referred to by name in the submission; and]

[(b) determine prior to initiating an investigation

(i) whether the complaint provides or is likely to provide a [possible] [reasonable] basis [in law or on the facts] for proceeding with a prosecution under this Statute; and

(ii) whether the case is or would be admissible under article 35; and

(iii) whether an investigation would be consistent with the terms of any relevant Security Council decision; and

(iv) whether to seek a preliminary ruling from the Court regarding the Court's jurisdiction if the case could later be challenged under article 34.]

2. The Prosecutor shall [may] initiate an investigation unless:

(a) the submission of the case to the Court under [French articles 37 and 38] is challenged within one month of notification under article 26 (1) (a) by a State Party which wishes to proceed or has proceeded with the case or by a person named in the submission; or

(b) the Prosecutor considers any determination within article 26 (1) (b) (i) to (iii) prevents further action; or

(c) the Prosecutor determines to seek a preliminary ruling in accordance with article 26 (1) (b) (iv);

in which case the Prosecutor shall so inform the Presidency [Indictment Chamber] [Preliminary Investigations Chamber of the Court] [and await its final ruling.]

As soon as an investigation is initiated, the Presidency shall designate one of the Trial Chambers constituted in accordance with article 9 (5) as an Indictment Chamber, the other then automatically becoming the Trial Chamber for the case.

3. (a) At the request of a complainant State or, in a case to which article 23 (1) applies, at the request of the Security Council, the Presidency [Preliminary Investigations Chamber] [Indictment Chamber] shall review a decision of the Prosecutor not to initiate an investigation and may request the Prosecutor to reconsider his decision.

(b) [In the event that the Prosecutor defers investigation on the ground that a State is proceeding with a national investigation, then the Prosecutor may request that the relevant State make available to the Prosecutor, either periodically or on reasonable request, a report on the progress of its investigation, which shall be confidential to the extent necessary. The Prosecutor shall notify the complainant State of the decision to defer to a State and shall notify the complainant State of any known outcome of such national investigation or prosecution.]

(c) [The Prosecutor shall not initiate an investigation into a case that has been investigated and prosecuted by a State following a deferral by the Prosecutor unless:

(i) the complainant State has lodged a further complaint with the Court on the grounds that the State investigation (or prosecution) has been inadequate, and the Prosecutor agrees;

(ii) following the Prosecutor's notice to the State where the case was prosecuted of the new complaint and of its opportunity to challenge the initiation of an investigation by the Prosecutor, the State where the case was prosecuted has challenged such an investigation by the Prosecutor and either has failed under the Statute to prevent the new investigation or has failed after a reasonable period of time to challenge the initiation of the new investigation; and

(iii) the Prosecutor, upon renewed consideration, has not reached any affirmative determination under article 26 (1) (i), (ii) or (iii).]

4. After a determination to initiate an investigation in accordance with article 26 (2), and prior to the commencement of a trial, a State requested by the Prosecutor to carry out investigations or a State on the territory of which the Prosecutor intends to conduct investigations may challenge the decision of the Prosecutor to initiate investigation before the Indictment Chamber on the grounds of lack of sufficient basis for a prosecution under this Statute.]

B. Duty of the Prosecutor

5. (a) The Prosecutor shall fully respect the rights of suspects under the Statute and the rules.

(b) [To establish the truth the Prosecutor shall [ex officio] extend the investigation to cover all facts and evidence that are relevant to an assessment of the charge and to the legal consequences that may follow. He shall investigate equally incriminating and exonerating circumstances.]

(c) [If the Prosecutor concludes that there is a basis for prosecution under this Statute, he shall, in accordance with the rules of the Court, investigate the case, by seeking the cooperation of the States concerned or by himself, and such investigation shall be conducted in conformity with international law and fully respecting the sovereignty of the States concerned.]

C. Powers of the Prosecutor to gather evidence

6. The Prosecutor may:

(a) request the presence of and question suspects, victims and witnesses;

(b) collect documentary and other evidence;

(c) [under the supervision of an investigative judge appointed by the Presidency] [on application of the Presidency] conduct on-site investigations [if the Presidency, having regard to the views of interested States, is satisfied that there are no civil authorities to whom a request for assistance under Part 7 of the Statute can be transmitted;]

(d) take necessary measures to ensure the confidentiality of information or the prosecution of any person;

(e) as appropriate, seek the cooperation of any State or of the United Nations, and

(f) (i) whenever it is necessary to carry out a reconnaissance, inspection, reconstruction or a scientific or technical test that, because of its nature and characteristics cannot be reproduced in full at a later stage during the trial, or whenever it is assumed that a witness will not be able to testify during trial because of some unsurmountable obstacle, the Prosecutor shall request the Presidency to appoint a judge to carry out or supervise the act;

(ii) the judge shall carry out or supervise the act in question notifying the Prosecutor, the accused and his or her counsel, who shall be authorized to be present and shall have the same right to intervene as during the rest of the trial. If the accused is detained, his or her counsel shall act in the accused's behalf, unless the accused expressly asks to be present in person, provided his place of detention is in the territory where the act is to be carried out;

(iii) when the accused is yet unknown or any of the acts described under (i) is extremely urgent, the Prosecutor may request the Presidency orally to appoint a judge, who shall carry out or supervise the act. The notifications provided in (ii) shall not be necessary but a counsel for the defence shall be appointed *ex officio* to control the act or to take part in it.

(g) apply to the Presidency [the Indictment Chamber] for the following orders, subpoenas and warrants in the course of his or her investigation:

[list to be inserted]

7. (Rights of suspect to gather evidence):

(a) (i) A person suspected of committing a crime within the meaning of this Statute shall, as soon as he is involved in an investigation or prosecuted under this Statute, be entitled to collect all of the evidence which he deems necessary for his defence;

(ii) He may either collect this evidence himself or request the Preliminary Investigations Chamber of the Court to enjoin the Prosecutor to accomplish certain acts, seeking, where necessary, cooperation from any State party. In that event, the Preliminary Investigations Chamber shall have a period of two months in which to respond to the accused's request;

(b) (i) The Prosecutor shall be required to accomplish any act which the Preliminary Investigations Chamber enjoins him to carry out pursuant to paragraph 3 of this article;

(ii) If the Preliminary Investigations Chamber rejects a request made pursuant to paragraph 3 of this article, its decision must be based on the futility of the act requested in the light of the patently dilatory nature of the request;

(iii) Notice of the decision by the Preliminary Investigations Chamber rejecting the request, which is not subject to appeal, must, in accordance with paragraph 3 of this article, be served on the person involved within two months following the date of his request. No other request may be made by the accused until the Preliminary Investigations Chamber has taken its decision or the two-month period expires;

(c) If the suspect elects to collect the evidence himself in accordance with article 26 (3) (a), he may apply to the Presidency for the following orders and subpoenas:

[list to be inserted]

8. If upon investigation the Prosecutor concludes that:

(a) a case is inadmissible under article 35; or

(b) there is no sufficient basis for a prosecution; or

(c) a prosecution would not be in the interests of justice

and decides not to file an indictment, the Prosecutor shall so inform the Presidency [Preliminary Investigations Chamber], the State which lodged the complaint under [French article 37] or the Security Council if the matter was submitted to the Court under [French article 38], giving details of the nature [, origin] and basis of complaint and the reasons why he is not instituting proceedings.

9. When the Prosecutor has decided not to file an indictment following an investigation, the Presidency [Preliminary Investigations Chamber] [Indictment Chamber] shall [may, either at the request of the State which lodged the complaint under or at the request of the Security Council, if the matter was

submitted to the Court under article 23 (1)] request the Prosecutor to reconsider his decision [but it may do so only once.]

D. Additional rights of suspects [and questioning of suspects]

10. (a) A person suspected of a crime under this Statute shall, prior to being questioned, be informed that the person is a suspect [and of the details, circumstances and evidence of the case and the laws applicable] and of entitlement to the rights:

[(i) to be presumed innocent in accordance with article 40; and]

(ii) to remain silent without such silence being a consideration in the determination of guilt or innocence; and

(iii) not to be compelled to testify [against himself] or to confess guilt; and

(iv) to have [at all times] the [prompt] assistance of [competent] counsel of, if the suspect lacks the means [efforts] to retain counsel, to have legal assistance provided by the [Preliminary Investigations Chamber of the] Court [and assignment of counsel shall be in accordance with the following rules:

a. A list of counsel who speak one or both of the working languages of the Court, meet the requirements of subrule 51 (b) and have indicated their willingness to be assigned by the Court to indigent suspects or accused, shall be kept by the Registrar;

b. The criteria for determination of indigency shall be established by the Registrar and approved by the judges;

c. In assigning counsel to an indigent suspect or accused, the following procedure shall be observed:

i. A request for assignment of counsel shall be made to the Registrar;

ii. The Registrar shall inquire into the means of the suspect or accused and determine whether the criteria of indigency are met;

iii. If he or she decides that the criteria are met, he or she shall assist counsel from the list; if he or she decides to the contrary, he or she shall inform the suspect or accused that the request is refused;

d. The suspect or accused may seek from the Presidency a review of a decision to refuse a request. The decision of the Presidency shall be final. The procedure governing review by the Presidency shall be laid down in the supplementary rules;

e. If a request is refused, a further request may be made by a suspect or an accused to the Registrar upon showing a change in circumstances;

f. The Registrar shall, in consultation with the judges, establish the criteria for the payment of fees to assigned counsel;

g. If a suspect or an accused elects to conduct his own defence, he or she shall so notify the Registrar in writing at the first opportunity;

h. Where an alleged indigent person is subsequently found not to be indigent, the Trial or Appeals Chamber may make an order of contribution to recover the cost of providing counsel for proceedings before that Chamber;]

[(v) not to be subject to torture or to cruel, inhuman or degrading treatment or punishment; and]

(vi) to be informed of the charges against him and questioned in a language which he understands and speaks, or if otherwise, to the [free] assistance of a competent interpreter, and to be provided [free of charge] with the translation of any document on which the suspect is to be questioned [or that show why a measure infringing his liberty or property has been proposed];

(b) Any person suspected of committing a crime within the meaning of this Statute must, before being questioned, or when a measure infringing his liberty or property has been proposed and brought to his attention, be fully informed of the charges against him and to the rights to which he is entitled under article 26 (1) (a) above;

(c) Questioning of a suspect shall not proceed without the presence of counsel unless the suspect has voluntarily waived his or her right to counsel. In case of waiver, if the suspect subsequently expresses the desire to have counsel, questioning shall thereupon cease, and shall only resume when the suspect has obtained or been assigned counsel;

(d) Before being questioned the suspect shall be invited to declare whatever he or she may deem advisable concerning the crime that is being investigated and to point out the evidence the suspect considers should be obtained [in accordance with article 26 (7)];

(e) Under no circumstances shall the suspect be asked to take an oath to speak the truth, nor shall he or she be subjected to any kind of coercion, duress, threat or promise, except those expressly authorized by [this Statute or the rules], nor shall any means to force or induce the suspect to speak the truth be used against him or her;

(f) No means in detriment to the freedom of decision of the suspect shall be used during questioning. The questions asked shall be clear and precise. When due to the length of questioning, it is, or should be, noticed that the suspect is too tired to continue or is no longer calm, questioning shall be adjourned until the suspect is fit to continue;

(g) Whenever the Prosecutor questions a suspect, the questioning shall be audio-recorded or video-recorded in accordance with the following procedure:

(i) The suspect shall be informed in a language he or she speaks and understands that the questioning is being audio-recorded or video-recorded;

(ii) In the event of a break in the course of the questioning, the fact and the time of the break shall be recorded before audio-recording or video-recording ends and the time of resumption of the questioning shall also be recorded;

(iii) At the conclusion of the questioning the suspect shall be offered the opportunity to clarify anything he or she has said, and to add anything he or she may wish, and the time of conclusion shall be recorded;

(iv) The tape shall then be transcribed as soon as practicable after the conclusion of questioning and a copy of the transcript supplied to the suspect, together with a copy of the recorded tape or, if multiple recording apparatus was used, one of the original recorded tapes;

(v) After a copy has been made, if necessary, of the recorded tape for purposes of transcription, the original recorded tape or one of the original tapes shall be sealed in the presence of the suspect under the signature of the Prosecutor and the suspect;

[(h) Evidence obtained during questioning in violation of these rules shall under no circumstances be used in the trial unless they are favourable to the suspect.]

Article 27

Commencement of prosecution

I. ILC DRAFT

1. If upon investigation the Prosecutor concludes that there is a prima facie case, the Prosecutor shall file with the Registrar an indictment containing a concise statement of the allegations of fact and of the crime or crimes with which the suspect is charged.

2. The Presidency shall examine the indictment and any supporting material and determine:

(a) whether a prima facie case exists with respect to a crime within the jurisdiction of the Court; and

(b) whether, having regard, inter alia, to the matters referred to in article 35, the case should on the information available be heard by the Court.

If so, it shall confirm the indictment and establish a trial chamber in accordance with article 9.

3. If, after any adjournment that may be necessary to allow additional material to be produced, the Presidency decides not to confirm the indictment, it shall so inform the complainant State or in a case to which article 23 (1) applies, the Security Council.

4. The Presidency may at the request of the Prosecutor amend the indictment, in which case it shall make any necessary orders to ensure that the accused is notified of the amendment and has adequate time to prepare a defence.

5. The Presidency may make any further orders required for the conduct of the trial, including an order:

(a) determining the language or languages to be used during the trial;

(b) requiring the disclosure to the defence, within a sufficient time before the trial to enable the preparation of the defence, of documentary or other evidence available to the Prosecutor, whether or not the Prosecutor intends to rely on that evidence;

(c) providing for the exchange of information between the Prosecutor and the defence, so that both parties are sufficiently aware of the issues to be decided at the trial;

(d) providing for the protection of the accused, victims and witnesses and of confidential information.

II. PROPOSALS

1. If [upon investigation] [following the investigation] [in [during] the course of an investigation] the Prosecutor [concludes] [is satisfied] that

[the case is admissible, that]

[there is a prima facie case [which the accused could be called on to answer and that is desirable in the interests of justice that the case should proceed]]

[a suspect has committed a crime within the jurisdiction of the Court]

[a case does exist against one or more persons named],

the Prosecutor shall

[file with the Registrar [of the Court]]

[prepare in writing and forward to the Registrar]

an indictment containing

[a concise statement of the allegations of fact and of the crime or crimes with which the suspect is charged]

[in respect of each of the persons referred to, their name, a statement of the allegations of fact against them, and the characterization of these facts in accordance with articles ... to ...] 30/

[for confirmation by the Presidency [the Indictment Chamber] [the Pre-Trial Chamber] together with supporting material]

A.[(i) The indictment shall be accompanied by all evidence collected by the Prosecutor. Other evidence may be freely added by the Prosecutor up until the time when the indictment is considered by the Preliminary Investigations Chamber. However, without prejudice to the provisions of paragraph (iii) of this article, no evidence submitted to the Registrar for purposes of accompanying the indictment may be withdrawn by the Prosecutor];

[(ii) The Prosecutor may amend the indictment up until the time it is considered by the Preliminary Investigations Chamber];

[(iii) The Prosecutor may also withdraw an indictment together with all the accompanying evidence until the time when the indictment is considered by the Preliminary Investigations Chamber];

[In that event the Preliminary Investigations Chamber may, under the conditions provided for in article ..., 31/ ask the Prosecutor to reconsider his decision.]

30/ Articles of the Statute dealing with crimes within the jurisdiction of the Court.

31/ Article of the Statute dealing with the closing of the case.

B.[(i) The indictment shall set forth the name and particulars of the suspect, a concise statement of the allegations of fact and of the crime or crimes with which the suspect is charged];

[(ii) The indictment shall also contain a statement regarding the basis for the Court to exercise jurisdiction];

[(iii) The supporting material referred to in subrule A shall include the evidence gathered by the Prosecutor];

[(iv) The Registrar shall forward the indictment and supporting material to the Presidency [the Indictment Chamber], which will inform the Prosecutor of the date fixed for review of the indictment]

2. [The Presidency] [the Indictment Chamber] [the Pre-trial Chamber] shall [constitute an Indictment Chamber comprising (a single judge/three judges) who are not members of the Trial Chamber to] examine the indictment and any supporting material and determine:

(a) whether a prima facie case exists with respect of a crime within the jurisdiction of the Court; [and]

(b) whether, having regard, inter alia, to the matters referred to in article 35, the case should on the information available be heard by the Court; [and]

[(c) whether it is desirable in the interests of justice that the case should proceed].

If so, it shall confirm the indictment [and establish a Trial Chamber in accordance with article 9 [and inform so the Presidency].

[Any State concerned may challenge the decision of the Prosecutor to file an indictment before the Indictment Chamber on grounds of inconsistency with this Statute]

[2a. Decisions of the Indictment Chamber shall be taken by a majority of the judges of the Chamber/by consensus]

A.[(i) On reviewing the indictment, the Presidency [the Indictment Chamber] shall hear the Prosecutor, who may present additional material in support of any count. The Presidency [Indictment Chamber] may also require the Prosecutor to present additional material in support of any count. The proceedings may be adjourned to allow additional material to be produced]

[(ii) if the accused is detained at the disposal of the Court, or, being free, he or she voluntarily submits himself or herself to its jurisdiction, the Indictment Chamber shall notify the accused of the date set for the review of the indictment, and shall provide him or her with a copy of the indictment by the Prosecutor. On the day of the hearing, the Indictment Chamber shall listen to the accused, who shall be allowed to raise objections to the indictment, to point out any flaws it may contain, to criticize the material on which the indictment is based and to point out the evidence that he or she deems relevant to decide about the existence of a criminal case and which has been omitted by the Prosecutor. If this is the first time the accused presents himself or herself, he or she shall be allowed to bring any motions contained in rule 79 (A), or wait until the term of 60 days established in rule 74 (B) has elapsed]

[(iii) The Presidency [Indictment Chamber] shall determine in relation to each count whether a prima facie case exists with respect to a crime within the Court's jurisdiction and shall dismiss those counts where such a case does not exist]

[(iv) The dismissal of a count in an indictment shall not preclude the Prosecutor from subsequently bringing a new indictment based on the acts underlying that count if supported by additional evidence]

[(v) If a prima facie case is found to exist in relation to one or more counts in the indictment, the Presidency [Indictment Chamber] shall determine whether, having regard, inter alia, to the matters referred to in article X (A 35 ILC) of the Statute, the case should on the information available be heard by the Court]

[(vi) If the Presidency [Indictment Chamber] determines that the case should be heard by the Court, it shall confirm the indictment and establish [shall ask the Presidency to establish] a Trial Chamber]

B.[1. The Preliminary Investigations Chamber shall proceed to consider indictment and any amendment thereto together with all the accompanying evidence.

2. It shall take a decision:

(a) on the admissibility of the case on the basis of the reasons in article 35, if the Court has not yet ruled on this issue;

(b) on the serious nature of the charges against the person or persons named in the indictment with respect to an offence within the Court's jurisdiction.]

1. If after considering the indictment, or after the further investigation requested in accordance with article 46, the Preliminary Investigations Chamber proposes to confirm the indictment it shall so inform the Prosecutor and the persons named in the indictment and shall indicate to them that it sill hold a hearing to consider the charges contained in the indictment.

The hearing shall be held at a date determined by the Preliminary Investigations Chamber, one month, at the earliest, from the day on which the persons named in the indictment were notified that the Preliminary Investigations Chamber proposed to confirm the indictment, and no later than three months from that same date.

2. The Registrar of the Court shall serve the Prosecutor and the persons named in the indictment with a summons to appear, containing the indictment, the place, date and time of the hearing and mentioning the rights which the suspects are recognized as having in accordance with article 51.

3. The persons named in the indictment are entitled to receive from the Registrar of the Court certified copies of all the evidence accompanying the indictment.

4. During the hearing organized before it, the Preliminary Investigations Chamber shall consider the indictment and the accompanying evidence. It shall hear the arguments of the Prosecutor, followed by those of the persons named in the indictment, the latter always being heard last.

5. Following the hearing and after deliberations, the Preliminary Investigations Chamber may:

(a) confirm the indictment in its entirety;

(b) confirm only part of the indictment and amend it, either by declaring the case inadmissible in part, for the reasons listed in article 35, if the Court has not already ruled on this issue or by withdrawing certain charges deemed not sufficiently serious or by giving some facts another characterization, in accordance with articles 27 and 32;

Refuse to confirm the indictment.

It must give the reasons for its decision based on the provisions of article 45 (2).

6. When it confirms the indictment in its entirety or in part, the Preliminary Investigations Chamber must commit the accuse to the Trial Chamber for trial on the facts referred to in the confirmation decision and with the characterization accepted in that decision. It shall uphold the warrants for the arrest and transfer of the accused or the warrants for judicial supervision issued earlier. It may, by taking a special decision, decide not to uphold these warrants or decide to amend the warrants for judicial supervision.

If it does not confirm the indictment, all the warrants issued prior to the decision of non-confirmation shall cease immediately to have effect.

* * *

[1. When the Preliminary Investigations Chamber proposes to confirm an indictment, but one or more of the persons named in the indictment has fled or cannot be found, it may still hold a hearing under the conditions provided for in article 48.

2. When it confirms the indictment, in its entirety or in part, against a person who has fled or cannot be found, the Preliminary Investigations Chamber shall issue a warrant to search for, arrest and transfer the accused, which is tantamount to committing him to the Trial Chamber for trial. This warrant must contain, in addition to the particulars listed in article 55, the statement of facts referred to in the confirmation decision, with the characterization accepted in that decision.

The warrant shall be disseminated by the Registrar of the Court using all appropriate means. When the person is found, the warrant shall be executed as a warrant of arrest and transfer, in accordance with the provisions of title II of this part.]

* * *

[1. Anyone who has personally suffered direct injury caused by a crime submitted to the Court may inform the Registrar of the Court in writing of the acts having caused injury to him and the nature and amount of the losses which he has sustained.

2. When a hearing is held under article 48, the Registrar of the Court shall transmit to the Preliminary Investigations Chamber the correspondence received from victims pursuant to paragraph 1 of this article.

3. When it confirms the indictment in its entirety or in part, the Preliminary Investigations Chamber may order the provisional seizure of all or part of the property of the person committed for trial, if it believes that such a measure is necessary to compensate the victims who have come forward in accordance with paragraph 1 of this article.

In that event, the Preliminary Investigations Chamber shall ask the Prosecutor to secure the cooperation of the States in whose territory the provisionally seized property is situated requesting them, inter alia, to freeze assets and to appoint official receivers.

The provisions of the preceding subparagraph shall also apply in the situations described in article 49.]

C. [The Presidency shall nominate in accordance with the rules three such judges to be members of the Pre-trial Chamber for a given case. A Pre-trial Chamber shall include at least two judges elected from among the persons nominated as having the qualification referred to in article 6 (1) (a). A Pre-trial Chamber shall be responsible in the given case for such functions as prescribed in [articles 26 (3) and (5), 27 (2) to (4), 27 (5) (b), 28 (1) to (3), 30 (3), and any other functions concerning pre-trial process].

6. The Presidency shall nominate in accordance with the rules five such judges who are not members of the Pre-trial Chamber for a given case to be members of the Trial Chamber for the same case. A Trial Chamber shall include at least three judges elected from among the persons nominated as having the qualification referred to in article 6 (1) (a).]

3. If after any adjournment that may be necessary to allow additional material to be produced, the presidency [the Indictment Chamber [the Pre-trial Chamber] decides not to confirm the indictment, it shall so inform the complainant State or, in a case to which article 23 (1) applies, the Security Council.

A.[1. After having considered the indictment in accordance with article 4, the Preliminary Investigations Chamber may defer ruling and may ask the Prosecutor to conduct a further investigation.

2. The Preliminary Investigations Chamber may indicate to the Prosecutor which issues it feels need to be investigated further.]

* * *

[1. After considering the indictment, or after the further investigation requested in accordance with article 46, the Preliminary Investigations Chamber may decide not to confirm the indictment. This decision must be based on the provisions of article 45 (2).

All warrants issued prior to this decision of non-confirmation shall cease immediately to have effect.

2. The Registrar of the Court shall immediately notify the persons named in the indictment, the Prosecutor, the States which, in accordance with titles II and II of this part, have been charged with executing a warrant or asked to cooperate and either the State which lodged the complaint under article 37, or the Security Council, if the matter was submitted to the Court under article 38 (1), of the non-confirmation of the indictment.

3. Non-confirmation of an indictment under this article shall not prevent the Prosecutor from preparing, in accordance with article 44, a new indictment on the basis of facts which were the grounds for the initial indictment which was not confirmed, in so far as additional supporting evidence is provided.]

4. [The Presidency [Indictment Chamber] [the Pre-trial Chamber] may at the request of the Prosecutor amend the indictment, in which case it] [In case of an amendment of the indictment by the Prosecutor or the Indictment Chamber, the Presidency] shall make any necessary orders to ensure that the accused is notified of the amendment and has adequate time to prepare a defence.

A. [The Prosecutor may amend an indictment, without leave, at any time before it is confirmed in the review proceedings under article **X** (A 27 ILC) of the Statute, but thereafter only with the leave of the Presidency [Indictment Chamber] or, if at trial, with leave of the Trial Chamber. If leave to amend is granted, the amended indictment shall be transmitted to the accused and to his or her counsel and where necessary, the date for trial shall be postponed to ensure adequate time for the preparation of the defence]

[The amendment of the indictment shall be possible only when the Prosecutor wishes to introduce a new fact or circumstance which modifies the legal characterization or the punishment for a crime or crimes contained in the indictment, or when it has been found out that a new crime has been committed in connection with the fact or facts contained in the indictment]

B.[5. Following the hearing and after deliberations, the Preliminary Investigations Chamber may:

(a) confirm the indictment in its entirety;

(b) confirm only part of the indictment and amend it, either by declaring the case inadmissible in part, for the reasons listed in article 35, if the Court has not already ruled on this issue, or by withdrawing certain charges deemed not sufficiently serious, or by giving some facts another characterization, in accordance with articles 27 to 32;

(c) refuse to confirm the indictment.

It must give the reasons for its decision based on the provisions of article 45 (2).]

[7. The Registrar of the Court shall promptly inform the accused, the Prosecutor, the States which, in accordance with titles II and III of this part have been charged with executing a warrant or asked to cooperate and either the State which lodged the complaint under article 37 or the Security Council, if the matter was submitted to the Court under article 38 (1), of the Preliminary Investigations Chamber's decision.]

* * *

[5. When an indictment is drawn up pursuant to article 44, the evidence collected in accordance with this article shall be attached to the indictment, shall be subject to the same conditions.

* * *

The accused shall enjoy the rights afforded to suspects under article 51, paragraph 1. He shall also be entitled:

- to a fair hearing by an independent and impartial tribunal. Subject to the provisions of article 104, the hearing shall be public;
- to have adequate time and facilities for the preparation of his defence;
- to be tried without undue delay;
- to examine or have examined the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
- to have communicated to him all evidence submitted to the Court.]

5. The Presidency may make any further orders required for the conduct of the trial, including an order:

(a) determining the language or languages to be used during the trial;

(b) requiring the disclosure to the defence, within a sufficient time before the trial to enable the preparation of the defence, of documentary or other evidence available to the Prosecutor, whether or not the Prosecutor intends to rely on that evidence;

(c) providing for the exchange of information between the Prosecutor and the defence, so that both parties are sufficiently aware of the issues to be decided at the trial;

(d) providing for the protection of the accused, victims and witnesses and of confidential information. 32/

A. [The working languages of the Court shall be English and French.]

* * *

[At the opening of the trial, the President of the Chamber shall ensure that the accused understands and speaks the language employed at the hearing. Should this not be the case, the accused shall be entitled to be assisted free of charge by an interpreter appointed by the President of the Trial Chamber;]

* * *

[1. Anyone suspected of committing a crime within the meaning of the present Statute shall be entitled to be informed of the charges against him and

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32/ Subparagraph (d) relates to the measures for protection of the accused, victims and witnesses available to the Court. See the different proposals on this issue under article 43.

questioned in a language which he understands, and, to this end, to have the free assistance of a competent interpreter, and to be provided free of charge with a translation of the documents on the basis of which he is being questioned or that show why a measure infringing upon his liberty or property has been proposed.]

B.[1. The Prosecutor may withdraw an indictment or one or more counts thereof, without leave, at any time before it is confirmed in the review proceedings under article X (A 27 ILC) of the Statute, but thereafter only with leave of the Presidency or, if at trial, only with leave of the Trial Chamber.

2. The withdrawal of the indictment or one or more counts thereof shall be promptly notified to the accused and to his or her counsel.]

* * *

[Subject to rule 68, upon the decision of the Presidency to confirm an indictment and establish a Trial Chamber under article X (A 27 ILC) of the Statute, the indictment shall be made public.

(a) The Presidency may, at the request of the Prosecutor, order that there be no public disclosure of the indictment until it is served on the accused, or in the case of joint accused, on all the accused. In exercising its discretion, the Presidency shall take account of all relevant factors, including the potential or pre-arrest flight of an accused, destruction of evidence and harm to victims or witnesses if the indictment is made public.

(b) The Presidency may, at the request of the Prosecutor, also order that there be no disclosure of an indictment, or part thereof, or of all or any part of any particular document or information, if satisfied that, the making of such an order is required to give effect to a provision of the rules, to protect confidential information obtained by the Prosecutor, or is otherwise in the interests of justice.]

Article 28

Arrest

I. ILC DRAFT

1. At any time after an investigation has been initiated, the Presidency may at the request of the Prosecutor issue a warrant for the provisional arrest of a suspect if:

(a) there is probable cause to believe that the suspect may have committed a crime within the jurisdiction of the Court; and

(b) the suspect may not be available to stand trial unless provisionally arrested.

2. A suspect who has been provisionally arrested is entitled to release from arrest if the indictment has not been confirmed within 90 days of the arrest, or such longer time as the Presidency may allow.

3. As soon as practicable after the confirmation of the indictment, the Prosecutor shall seek from the Presidency a warrant for the arrest and transfer of the accused. The Presidency shall issue such a warrant unless it is satisfied that:

(a) the accused will voluntarily appear for trial; or

(b) there are special circumstances making it unnecessary for the time being to issue the warrant.

4. A person arrested shall be informed at the time of arrest of the reasons for the arrest and shall be promptly informed of any charges.

II. PROPOSALS

A. Is it possible - and on which grounds - to order measures restricting or suppressing the liberty of an accused before the indictment?

At any time after an investigation has been initiated, the Presidency may at the request of the Prosecutor issue a warrant for the provisional arrest of a suspect if:

(a) there is probable cause to believe that the suspect may have committed a crime within the jurisdiction of the Court; and

(b) the suspect may not be available to stand trial unless provisionally arrested.

* * *

Any person implicated under this Statute shall remain free during the proceedings, unless he is placed under judicial supervision or taken into custody prior to the judgement, in accordance with the rules and conditions set forth below.

Persons aged 13 to 18 at the time of the proceedings may be taken into custody prior to the judgement only under exceptional circumstances.

The decision to place a person under judicial supervision prior to the judgement shall be taken by the Preliminary Investigations Chamber of the Court at the request of the Prosecutor.

The Preliminary Investigations Chamber may also place a person under judicial supervision when it declines to grant the Prosecutor's request that he be taken into custody, but wishes to impose certain restrictions on his freedom, or when it releases a person and wishes to impose certain restrictions on his release.

When it issues a warrant for judicial supervision, the Preliminary Investigations Chamber subjects a person to one or more obligations, in particular:

(a) not to go outside the territorial limits established by the Preliminary Investigations Chamber without its explicit agreement;

(b) not to leave his place of abode or a residence established by the Preliminary Investigations Chamber except under the conditions and for the reasons determined by it;

(c) not to frequent certain places and to refrain from contact with certain persons designated by the Preliminary Investigations Chamber;

(d) to respond to attendance notices issued by any authority or qualified person designated by the Preliminary Investigations Chamber;

(e) not to engage in certain professional activities;

(f) to pay a security deposit, the amount, time limits and payment terms of which shall be determined by the Preliminary Investigations Chamber;

(g) to hand-over to the Registrar of the Court all documents establishing his identity, including his passport;

(h) to furnish securities in rem or in personam designed to guarantee the rights of the victims.

Persons aged 13 to 18 at the time of the proceedings may also be placed in appropriate educational institutions.

Warrants for judicial supervision may be issued at any time before trial.

Prior to the confirmation of the indictment, the Preliminary Investigations Chamber may issue warrants of provisional arrest and detention after the investigation has been initiated.

While it is considering the confirmation of the indictment, the Preliminary Investigations Chamber may issue warrants of arrest and transfer.

* * *

Replace "Presidency" by "Indictment Chamber".

* * *

No person shall be subjected to arbitrary arrest or detention. Nor shall any person be deprived of his liberty except on such grounds and in accordance with such procedure as are established by the rules of the Court.

* * *

When the Trial Chamber deems that the danger of the accused escaping or hindering the proceedings may reasonably be avoided by methods other than detention, it may order any of the following measures:

(a) home arrest, in his own home or under somebody else's custody, and watched or guarded in the way the Trial Chamber shall determine;

(b) the obligation of submitting himself to the care or guard of a certain person or institution, who shall periodically report to the tribunal;

(c) the prohibition to absent himself without leave from the territory of the State where he is or to absent himself from the territory determined by the Trial Chamber.

The Trial Chamber may impose one of these measures or combine some of them, depending on the case, and shall order the steps to be taken and the notifications necessary to guarantee their enforcement.

* * *

In cases of urgency, when the Court makes a request for provisional detention, notifying the requested Party that a warrant of arrest has been issued or a sentence had been imposed for an offence specified in article [ ], the requested State party may provisionally detain the person sought in accordance with its national laws.

* * *

At any time after an investigation has been initiated, the Presidency may at the request of the Prosecutor issue a warrant for the arrest of a suspect before indictment if:

(a) there is probable cause to believe that the suspect may have committed a crime within the jurisdiction of the Court; and

(b) the suspect may not be available to stand trial unless arrested before indictment.

B. Maximum duration of detention before indictment

A suspect who has been provisionally arrested is entitled to release from arrest if the indictment has not been confirmed within 90 days of the arrest, or such longer time as the Presidency may allow.

* * *

Any person for whom a warrant of arrest and detention is issued shall be released if the indictment concerning him, accompanied by a warrant of arrest and transfer replacing the initial warrant, are not served on him within 60 days from the date of his arrest.

Notwithstanding the provisions of paragraph 2 of this article and article 66 (5), the effects of a warrant of arrest and detention shall not be interrupted by the actions challenging the submission of cases to the Court provided for in article 69.

* * *

"... within 60 days of the arrest ____________. Upon request of the Prosecutor, the Indictment Chamber may under exceptional circumstances extend this period to a maximum extent of 90 days."

* * *

1. A warrant of arrest issued pursuant to article X (A 28 (3) ILC) of the Statute shall be signed by the Presidency or the Judge (or Trial Chamber) who has dealt with the matter pursuant to a delegation under article X (A 8 (5) ILC) of the Statute and shall bear the seal of the Court. It shall be accompanied by a copy of the indictment and a statement of the rights of the accused under the Statute and rules.

2. A warrant for the arrest of the accused and an order for his surrender to the Court shall be transmitted by the Registrar to the national authorities of the State in whose territory or under whose jurisdiction or control the accused resides, or was last known to be, together with instructions that at the time of arrest the indictment and the statement of the rights of the accused be read to him or her in a language he or she understands and that he or she be cautioned in that language.

3. When an arrest warrant issued by the Court is executed, a member of the Prosecutor's Office may be present as from the time of arrest with the agreement of the State concerned.

[Note. If provisional arrest as contemplated in A 28 (1) of the ILC Statute is retained, a similar rule to this one will need to be elaborated in part VI, Investigation and rights of suspects.]

* * *

A suspect who has been provisionally arrested is entitled to release from arrest if the indictment has not been confirmed within 30 days of the arrest, or such longer time as the Presidency may allow if the special circumstances so require.

* * *

If the Court fails to present the request for extradition within [30] days from the date of provisional detention, the person detained shall be set at liberty; provided that this stipulation shall not prevent the requested State from instituting a proceeding with a view to extraditing the person sought if a request for extradition is subsequently received.

* * *

(a) The Prosecutor shall transmit the warrant to the State where the suspect is located, along with a request for the arrest of the suspect and a statement of the reasons to believe that the suspect may have committed a crime within the jurisdiction of the Court and that the Prosecutor expects to file an indictment and make a request for indictment within [90] days. The arrest request should be accompanied by a description of the person sought, together with all available information that will help to identify and locate the person. Where necessary under the law of the State where the suspect is located, the Prosecutor should also provide a brief summary of the facts of the case and the reasons why pre-indictment arrest is believed to be urgent and necessary.

(b) Where a suspect is arrested before the indictment and an indictment is subsequently filed against the suspect, the Prosecutor shall transmit a copy of the indictment to the State with custody of the accused, along with a request that the accused be surrendered to the Court for trial. The request should be followed by such other additional material as may be required by the law of the State with custody of the accused.

(c) In the case where a suspect has been arrested before indictment, if before the expiry of [90] days, a decision is taken by the Prosecutor not to indict the suspect or the Presidency decides not to confirm the indictment, the Prosecutor shall immediately advise the custodial State of that fact and the custodial State shall take steps to have the suspect immediately released from custody or any conditions of bail. 33/

C. Measures that can be taken at the time of or after the indictment

As soon as practicable after the confirmation of the indictment, the Prosecutor shall seek from the Presidency a warrant for the arrest and transfer of the accused. The Presidency shall issue such a warrant unless it is satisfied that:

(a) the accused will voluntarily appear for trial; or

(b) there are special circumstances making it unnecessary for the time being to issue the warrant.

* * *

Under a warrant of arrest and detention, the person shall be arrested by the competent national authorities and brought before the appropriate national judicial authority pursuant to article 55 (3).

If the accused is already in custody under a warrant of arrest and detention, pursuant to article 58, the warrant of arrest and transfer shall replace the initial warrant.

33/ A concern is that this provision may create constitutional problems for certain States for which it would be unacceptable for a person to be in custody for a period and then not be indicted. A possible solution is to insert a provision that some form of assurance should be given that an indictment will follow the request for arrest.

The warrant of arrest and transfer and the confirmed indictment shall be served on the accused in his place of detention. He shall be brought before the appropriate national judicial authority pursuant to article 55 (3).

The accused shall be kept in custody and transferred to the Court in the conditions provided for in Part 4, Title III, of this Statute.

If the accused is not in custody and his place of residence is known, he shall be arrested by the competent national authorities and brought before the appropriate national judicial authority pursuant to article 55 (3).

The accused shall be taken into custody pursuant to the warrant of the Preliminary Investigations Chamber, in an appropriate place of detention in the State responsible for executing the warrant and shall be transferred to the Court in the conditions provided for in Part 4, Title III, of this Statute.

If the accused is a fugitive, the warrant of arrest and transfer issued by the Preliminary Investigations Chamber shall have the effect of a warrant to search for the wanted person and shall be disseminated by all appropriate means. Once the accused is apprehended, the authorities shall proceed in accordance with paragraph 2 of this article.

A warrant of arrest and transfer shall remain in effect until the date of the judgement. Its effects shall not be interrupted by the actions challenging the submission of cases to the Court provided for in article 69.

* * *

In the case where no pre-indictment warrant has been obtained, as soon as practicable after the confirmation of the indictment, the Prosecutor shall seek from the Presidency a warrant for the arrest of the accused. The Presidency shall issue such a warrant unless it is satisfied that:

(a) the accused will voluntarily appear for trial;

(b) there are special circumstances making it unnecessary for the time being to issue the warrant.

The Prosecutor shall transmit the warrant to the State where the accused is located along with a request that the accused be arrested and surrendered to the Court for trial. The request should be accompanied by a description of the person sought, together with all available information that will help identify and locate the person. The request should be followed by such other additional material as may be required by the law of the State where the accused is located.

D. Who can request - and following which formal requirements and procedure - such measures to be taken, whether before or after the indictment

A request for arrest or surrender [duly signed by the Prosecutor] shall:

(a) be made by letter, fax, e-mail or any medium capable of delivering a written record (provided that a request shall be confirmed through the diplomatic channel);

(b) contain or be supported by:

(i) information describing the person sought, sufficient to identify the person and information as to that person's probable location;

(ii) in the case of a request for pre-indictment arrest:

  a. a copy of the warrant for arrest;

  b. a statement of the reasons to believe the suspect may have committed a crime within the jurisdiction of the Court and that the Prosecutor expects to seek an indictment within [90] days;

  c. a brief summary of the facts of the case;

  d. a statement as to why pre-indictment arrest is urgent and necessary;

(iii) in the case of a request for post-indictment arrest and surrender of a person not yet convicted:

  a. a copy of the warrant of arrest and indictment;

  b. such information, documents or statements outlining the facts of the case as may be required by the law of the requested State;

(iv) in the case of a request for the arrest and surrender of a person already convicted:

  a. a copy of any warrant of arrest for that person;

  b. a copy of the judgement of conviction;

  c. information to demonstrate that the person sought is the person referred to in the judgement of conviction;

  d. (if the person sought has been sentenced) a copy of the sentence imposed and a statement of any time already served and that remaining.

Where the requested State Party considers the information provided insufficient to allow it to comply with the request it may seek, without delay, additional information.

* * *

The decision to detain a person prior to the judgement shall be taken by the Preliminary Investigations Chamber of the Court at the request of the Prosecutor. The Preliminary Investigations Chamber must give a reason for its decision based on paragraphs 2 and 3 of this article.

Under this Statute, a person may be detained prior to the judgement when, notwithstanding his assertions to the contrary, there are serious reasons for believing that he has participated in a crime, either as perpetrator or as accomplice, and that taking him into custody is the only way to:

(a) preserve the evidence or material clues;

(b) avoid pressure on witnesses and victims;

(c) prevent fraudulent consultation with other possible perpetrators and accomplices;

(d) protect him;

(e) put a stop to the crime or prevent its recurrence;

(f) ensure that he remains at the disposal of the Court if the risks of flight appear to be high.

Detention prior to the judgement may also be decided on if the person wilfully evades the obligations of judicial supervision to which he has been subjected under article 53.

The Prosecutor's written request for the issuance of a warrant of arrest or restriction of liberty prior to the judgement must contain the name of the person concerned, a statement of the charges against him and the reasons for which the warrant is necessary, along with a list of States Parties capable of executing the warrant. The Preliminary Investigations Chamber shall request the Prosecutor to provide it with all available evidence.

The warrant issued by the Preliminary Investigations Chamber must contain:

(a) the name of the person concerned;

(b) a statement of the charges against him;

(c) the reasons for the issuance of the warrant;

(d) a statement of the suspect's rights under article 51 (1);

(e) a statement of the suspect's right to request, at any time, either his release or the suspension or amendment of judicial supervision, pursuant to article 56.

The States Parties listed in the Prosecutor's request shall be notified of a warrant issued by the Preliminary Investigations Chamber. The warrant shall take effect as soon as it is brought to the attention of the person concerned by the national authorities charged with executing it.

Any person for whom the Preliminary Investigations Chamber issues a warrant of arrest or restriction of liberty must receive a certified copy of the warrant and must be promptly brought before the appropriate judicial authority of the State in which the warrant is executed. The national judicial authority shall ensure that the warrant does, in fact, apply to that person and that it meets the formal requirements laid down in this Statute.

* * *

1. A warrant of arrest issued pursuant to article X (A 28 (3) ILC) of the Statute shall be signed by the Presidency or the Judge (or Trial Chamber) who has dealt with the matter pursuant to a delegation under article X (A 8 (5) ILC) of the Statute and shall bear the seal of the Court. It shall be accompanied by a copy of the indictment, and a statement of the rights of the accused under the Statute and Rules.

2. A warrant for the arrest of the accused and an order for his surrender to the Court shall be transmitted by the Registrar to the national authorities of the State in whose territory or under whose jurisdiction or control the accused resides, or was last known to be, together with instructions that at the time of arrest the indictment and the statement of the rights of the accused be read to him or her in a language he or she understands and that he or she be cautioned in that language.

3. When an arrest warrant issued by the Court is executed, a member of the Prosecutor's Office may be present as from the time of arrest with the agreement of the State concerned.

[Note. If provisional arrest as contemplated in A 28 (1) of the ILC Statute is retained, a similar rule will need to be elaborated in Part VI, Investigation and rights of suspects.]

* * *

The request for provisional detention shall describe the identity of the person to be sought and the facts of the case, and shall contain such further information as may be required by the laws of the requested State.

If the Court fails to present the request for extradition within [30] days from the date of provisional detention, the person detained shall be set at liberty; provided that this stipulation shall not prevent the requested State from instituting a proceeding with a view to extraditing the person sought if a request for extradition is subsequently received.

When ratifying this Statute, States Parties shall notify the Secretary-General of the United Nations of the conditions under which they would refuse provisional detention and shall specify elements which must be included in a written request for provisional detention. States Parties shall not refuse a request for detention for reasons other than those indicated.

E. Information which should be given to the arrested person

[Note. The question of the rights of the arrested is dealt with in detail in paragraph 26 (6); the question of the information to be provided to the suspected/accused is dealt with in paragraph 30.]

A person arrested shall be informed at the time of arrest of the reasons for the arrest and shall be promptly informed of any charges.

* * *

If the accused is already in custody under a warrant of arrest and detention, pursuant to article 58, the warrant of arrest and transfer shall replace the initial warrant.

The warrant of arrest and transfer and the confirmed indictment shall be served on the accused in his place of detention. He shall be brought before the appropriate national judicial authority pursuant to article 55 (3).

The accused shall be kept in custody and transferred to the Court under the conditions provided for in Part 4, Title III, of this Statute.

* * *

Any person who is arrested or provisionally arrested shall be informed, at the time of arrest or provisional arrest, of the reasons for his arrest or provisional arrest and shall be promptly informed of any charges against him/her in accordance with the rules of the Court.

Any person arrested, provisionally arrested or detained on a criminal charge shall, in accordance with the rules of the Court, be brought promptly before a judge or other officer authorized to exercise judicial power and shall be entitled to trial within a reasonable time or to release.

* * *

[Note. The question of challenge against such measures is dealt with under paragraph 29. The questions of the content of a warrant of arrest and transfer and of provisional arrest are also dealt with in articles 53, 53 bis and 53 ter of the report of the working group on cooperation. See in particular pages 117, 121, 122, 123 and 124 of the report of the first session of the Preparatory Committee (A/AC.249/1).]

* * *

The following proposal for article 28 was also made by the informal group on judicial cooperation and enforcement:

1. At any time after an investigation has been initiated, the Presidency may at the request of the Prosecutor issue a warrant for the arrest of a suspect before indictment if:

(a) there is probable cause to believe that the suspect may have committed a crime within the jurisdiction of the Court; and

(b) the suspect may not be available to stand trial unless arrested before indictment.

2. (a) The Prosecutor shall transmit the warrant to the State where the suspect is located, along with a request for the arrest of the suspect and a statement of the reasons to believe that the suspect may have committed a crime within the jurisdiction of the Court and that the Prosecutor expects to file an indictment and make a request for indictment within [90 days]. The arrest request should be accompanied by a description of the person sought, together with all available information that will help to identify and locate the person. Where necessary under the law of the State where the suspect is located, the Prosecutor should also provide a brief summary of the facts of the case and the reasons why pre-indictment arrest is believed to be urgent and necessary.

(b) Where a suspect is arrested before the indictment and an indictment is subsequently filed against the suspect, the Prosecutor shall transmit a copy of the indictment to the State with custody of the accused, along with a request that the accused be surrendered to the Court for trial. The request should be followed by such other additional material as may be required by the law of the State with custody of the accused.

(c) In the case where a suspect has been arrested before indictment, if before the expiry of [90 days], a decision is taken by the Prosecutor not to indict the suspect or the Presidency decides not to confirm the indictment, the Prosecutor shall immediately advise the custodial State of that fact and the custodial State shall take steps to have the suspect immediately released from custody or any conditions of bail. 34/

3. In the case where no pre-indictment warrant has been obtained, as soon as practicable after the confirmation of the indictment, the Prosecutor shall seek from the Presidency a warrant for the arrest of the accused. The Presidency shall issue such a warrant unless it is satisfied that:

(a) the accused will voluntarily appear for trial; or

(b) there are special circumstances making it unnecessary for the time being to issue the warrant.

3 bis. The Prosecutor shall transmit the warrant to the State where the accused is located along with a request that the accused be arrested and surrendered to the Court for trial. The request should be accompanied by a description of the person sought, together with all available information that will help identify and locate the person. The request should be followed by such other additional material 35/ as may be required by the law of the State where the accused is located.

34/ A concern is that this provision may create constitutional problems for certain States, for which it would be unacceptable for a person to be in custody for a period and then not be indicted. A possible solution is to insert a provision that some form of assurance should be given that an indictment will follow the request for arrest.

35/ Only information pertaining to elements of fact, and not of law, is envisaged under this provision.

Article 29

Pre-trial detention or release

I. ILC DRAFT

1. A person arrested shall be brought promptly before a judicial officer of the State where the arrest occurred. The judicial officer shall determine, in accordance with the procedures applicable in that State, that the warrant has been duly served and that the rights of the accused have been respected.

2. A person arrested may apply to the Presidency for release pending trial. The Presidency may release the person unconditionally or on bail if it is satisfied that the accused will appear at the trial.

3. A person arrested may apply to the Presidency for a determination of the lawfulness under this Statute of the arrest or detention. If the Presidency decides that the arrest or detention was unlawful, it shall order the release of the accused, and may award compensation.

4. A person arrested shall be held, pending trial or release on bail, in an appropriate place of detention in the arresting State, in the State in which the trial is to be held or if necessary, in the host State.

II. PROPOSALS

A. Is the control over the legality of the detention (or other measures) within the competence of the national judicial authorities, the Court or both?

A person arrested shall be brought promptly before a judicial officer of the State where the arrest occurred. The judicial officer shall determine, in accordance with the procedures applicable in that State, that the warrant has been duly served and that the rights of the accused have been respected.

* * *

1. Once detained, an accused may not be released except upon an order of the Trial Chamber.

2. When the Trial Chamber deems that the danger of the accused escaping or hindering the proceedings may reasonably be avoided by methods other than detention, it may order any of these measures:

(a) home arrest, in his own home or under somebody else's custody, and watched or guarded in the way the Trial Chamber shall determine;

(b) the obligation of submitting himself to the care or guard of a certain person or institution, who shall periodically report to the tribunal;

(c) the prohibition to absent himself without leave from the territory of the State where he is or to absent himself from the territory determined by the Trial Chamber.

The Trial Chamber may impose one of these measures or combine some of them depending on the case, and shall order the steps to be taken and the notifications necessary to guarantee their enforcement.

An accused who has been detained may request the Trial Chamber to order his or her release with no restrictions or the substitution of his or her detention for any of the measures provided in the chapeau of paragraph 2 above. The accused shall also have the right to appeal any resolution against his request before the Appeals Chamber pursuant to rule 128.

* * *

Once detained, an accused may not be released except upon an order of the Presidency.

* * *

A person against whom a warrant of arrest has been issued may challenge the warrant before the Indictment Chamber on the grounds of inconsistency with this Statute.

* * *

The States Parties listed in the Prosecutor's request shall be notified of a warrant issued by the Preliminary Investigations Chamber. The warrant shall take effect as soon as it is brought to the attention of the person concerned by the national authorities charged with executing it.

Any person from whom the Preliminary Investigations Chamber issues a warrant of arrest or restriction of liberty must receive a certified copy of the warrant and must be promptly brought before the appropriate judicial authority of the State in which the warrant is executed. The national judicial authority shall ensure that the warrant does, in fact, apply to that person and that it meets the formal requirements laid down in this Statute.

Under a warrant of arrest and detention, the person shall be arrested by the competent national authorities and brought before the appropriate national judicial authority pursuant to article 55 (3).

If the accused is already in custody under a warrant of arrest and detention, pursuant to article 58, the warrant of arrest and transfer shall replace the initial warrant.

The warrant of arrest and transfer and the confirmed indictment shall be served on the accused in his place of detention. He shall be brought before the appropriate national judicial authority pursuant to article 55 (3).

The accused shall be kept in custody and transferred to the Court in the conditions provided for in Part 4, Title III, of this Statute.

If the accused is not in custody and his place of residence is known, he shall be arrested by the competent national authorities and brought before the appropriate national judicial authority pursuant to article 55 (3).

The accused shall be taken into custody, pursuant to the warrant of the Preliminary Investigations Chamber, in an appropriate place of detention in the

State responsible for executing the warrant and shall be transferred to the Court in the conditions provided for in Part 4, Title III, of this Statute.

* * *

A person arrested may apply to the Presidency for a determination of the lawfulness under this Statute of any arrest warrant or order of detention issued by the Court.

* * *

Replace "the Presidency" by "the indictment Chamber".

* * *

The State that has received a pre- or post-indictment warrant and a request for the arrest of a suspect shall immediately, in accordance with its law, take steps to arrest the suspect on the basis of the warrant of the Court or by obtaining a domestic warrant for arrest based on the Court's warrant and request.

A person arrested shall be brought promptly before a judicial officer in the custodial State who shall determine, in accordance with the law of that State, that the person has been arrested in accordance with the proper process and that the person's rights have been respected.

B. What are the conditions and procedures for conditional release (probational bail) and how is detention re-examined by the Court?

A person arrested may apply to the Presidency for release pending trial. The Presidency may release the person unconditionally or on bail if it is satisfied that the accused will appear at the trial.

* * *

Release may only be ordered by the Trial Chamber once the host State has been heard, and only if it is satisfied that the accused will appear for trial and that, if released, will neither pose a danger to any victim, witness or any other person nor hinder the investigation or the trial by destroying or concealing evidence or by threatening or intimidating witnesses.

The Trial Chamber may impose such conditions upon the release of the accused as it may determine appropriate, including the execution of a bail bond and the observance of such conditions as are necessary to ensure his or her presence for trial and the protection of others.

Every three months the Trial Chamber shall re-examine the reasons why it ordered the detention of the accused and, depending on the case, shall order that it shall be continued or substituted for some other measure or that the accused shall be released. The provisional detention of the accused shall not continue for a longer period than a year since the detention was ordered. At the request substantiated by the Prosecutor, the Presidency may order that the detention be extended for an additional year under the condition that the Prosecutor explains that there are sufficient reasons for the need of the extension and can reasonably estimate the time necessary to bring the accused to trial.

* * *

Release may be ordered by the Presidency only in exceptional circumstances, after hearing the host country and only if it is satisfied that the accused will appear for trial and, if released, will not pose a danger to any victim, witness or other person.

The Presidency may impose such conditions upon the release of the accused as it may determine appropriate, including the execution of a bail bond and the observance of such conditions as are necessary to ensure his or her presence for trial and the protection of others.

* * *

At any time during the proceedings, the Preliminary Investigations Chamber may, either of its own initiative or at the request of the person concerned or the Prosecutor, release the person concerned or suspend or amend the terms of judicial supervision.

Even in the absence of any request made under the preceding paragraph, the warrant issued by the Preliminary Investigations Chamber must be reviewed every four months, failing which it shall cease to have effect.

When the Preliminary Investigations Chamber receives a request for release under paragraph 1 of this article, it shall have 15 days in which to respond, failing which the person concerned shall be released immediately. The Registrar of the Court shall promptly notify the Prosecutor, the person in custody and the State in which he is held of the decision of the Preliminary Investigations Chamber.

* * *

An accused surrendered to the Court may apply to the Presidency for interim release pending trial. The Presidency may release the accused with or without conditions if satisfied the person will appear for trial.

* * *

In the case of a person arrested before indictment, if no indictment is received within [90 days] of that person's arrest or the Prosecutor advises the custodial State that no indictment will be filed, the person shall be released from custody or any terms of interim release. The release of the person shall not preclude that person's re-arrest should an indictment and a warrant be submitted at a later date.

An accused surrendered to the Court may apply to the Presidency for interim release pending trial. The Presidency may release the accused with or without conditions if satisfied the person will appear for trial.

C. If the Court (or the appropriate national authorities) decides that the arrest or detention was illegal, what are the consequences of that decision?

A person arrested may apply to the Presidency for a determination of the lawfulness under this Statute of the arrest or detention. If the Presidency decides that the arrest or detention was unlawful, it shall order the release of the accused, and may award compensation.

* * *

If the Preliminary Investigations Chamber decides to release the person concerned because his arrest or detention was unlawful, it may award him compensation.

The decisions of the Preliminary Investigations Chamber to release a person or to suspend or amend his judicial supervision shall be executed by the State Party in which the person concerned is being held or which is responsible for such judicial supervision, as soon as it has received notification through the Registrar of the Court.

* * *

The Court shall make compensation to those who were:

(a) pronounced innocent by an irrevocable adjudication;

(b) arrested or detained for the purpose of prosecution, although the prosecution against him did not eventually take place;

(c) arrested or detained but the lawfulness of that arrest or detention was denied in accordance with this Statute; or

(d) illegally inflicted losses upon by an officer of the Court, intentionally or negligently in the course of performing its duties.

Procedures and criteria for compensation shall be provided in the rules, including the expenses to be borne by a complaint State if that State lodged a complaint without enough reason.

* * *

If the Presidency decides that the arrest warrant or order of detention was unlawful, it shall order the withdrawal of all requests for surrender and for provisional arrest made pursuant to the warrant or order, and may award compensation.

* * *

A person arrested may apply to the Presidency for a determination of the lawfulness under this Statute of the arrest or detention. The Presidency shall in any case review ex officio every 30 days the lawfulness under this Statute of the arrest or detention. If the Presidency decides ...

* * *

A person arrested may apply to the Presidency for a determination of the lawfulness under this Statute of any arrest warrant or order of determination issued by the Court. If the Presidency decides that the arrest or detention was unlawful under the Statute, it shall order the release of the accused, and may award compensation.

A person arrested shall have the right to apply to a judicial officer in the custodial State for interim release pending the indictment or surrender of the person. The custodial State shall ensure that the views of the Prosecutor on interim release are brought to the attention of the judicial officer.

D. Appropriate place for detention

A person arrested shall be held, pending trial or release on bail, in an appropriate place of detention in the arresting State, in the State in which the trial is to be held or, if necessary, in the host State.

* * *

Upon his or her transfer to the seat of the Court, the accused shall be detained in facilities provided by the host country, or by another country. The Presidency may under article X (A 29 ILC) of the Statute, on the application of a party, modify the conditions of detention of an accused.

Note: There is a question as to whether the Trial Chamber should carry out this function instead. There is also the issue of whether the host State should have standing in relation to detention decisions.

* * *

A person arrested shall be held, pending trial or release on bail, in an appropriate place of detention in the arresting State, in the State in which the trial is to be held or, if necessary, in the host State.

E. Case of an accused absent or fugitive

If necessary, the Presidency may issue a warrant of arrest to secure the presence of an accused who has been released or is for any other reason at liberty.

* * *

If the accused is a fugitive, the warrant of arrest and transfer issued by the Preliminary Investigations Chamber shall have the effect of a warrant to search for the wanted person and shall be disseminated by all appropriate means. Once the accused is apprehended, the authorities shall proceed in accordance with paragraph 2 of this article.

* * *

Note. The question of implementation of the warrants of detention, arrest, transfer, is dealt with in the part on assistance and cooperation.

* * *

The following proposal for article 29 was also made by the informal group on judicial cooperation and enforcement:

1. The State that has received a pre- or post-indictment warrant and a request for the arrest of a suspect shall immediately, in accordance with its law, take steps to arrest the suspect on the basis of the warrant of the Court or by obtaining a domestic warrant for arrest based on the Court's warrant and request.

2. A person arrested shall be brought promptly before a judicial officer in the custodial State who shall determine, in accordance with the law of that State, that the person has been arrested in accordance with the proper process and that the person's rights have been respected.

3. A person arrested may apply to the Presidency for a determination of the lawfulness under this Statute of any arrest warrant or order of determination issued by the Court. If the Presidency decides that the arrest or detention was unlawful under the Statute, it shall order the release of the accused, and may award compensation.

3 bis. A person arrested shall have the right to apply to a judicial officer in the custodial State for interim release pending the indictment or surrender of the person. The custodial State shall ensure that the views of the Prosecutor on interim release are brought to the attention of the judicial officer.

4. A person arrested shall be held, pending trial or release on bail, in an appropriate place of detention in the arresting State, in the State in which the trial is to be held or, if necessary, in the host State.

4 bis. In the case of a person arrested before indictment, if no indictment is received within [90 days] of that person's arrest or the Prosecutor advises the custodial State that no indictment will be filed, the person shall be released from custody or any terms of interim release. The release of the person shall not preclude that person's re-arrest should an indictment and a warrant be submitted at a later date.

5 bis. An accused surrendered to the Court may apply to the Presidency for interim release pending trial. The Presidency may release the accused with or without conditions if satisfied the person will appear for trial.

Article 30

Notification of the indictment

I. ILC DRAFT

1. The Prosecutor shall ensure that a person who has been arrested is personally served, as soon as possible after being taken into custody, with certified copies of the following documents, in a language understood by that person:

(a) in the case of a suspect provisionally arrested, a statement of the grounds for the arrest;

(b) in any other case, the confirmed indictment;

(c) a statement of the accused's rights under this Statute.

2. In any case to which paragraph (1) (a) applies, the indictment shall be served on the accused as soon as possible after it has been confirmed.

3. If, 60 days after the indictment has been confirmed, the accused is not in custody pursuant to a warrant issued under article 28 (3), or for some reason the requirements of paragraph 1 cannot be complied with, the Presidency may on the application of the Prosecutor prescribe some other manner of bringing the indictment to the attention of the accused.

II. PROPOSALS

A. Information to be provided relating to the indictment or warrant 36/

1. The [Prosecutor] [Registrar] shall ensure that a person who has been arrested is personally served, as soon as possible after being taken into custody, with certified copies of the following documents, in a language understood by that person:

(a) in the case of a suspect provisionally arrested, [a statement of the grounds for arrest] [the warrant of arrest or restriction of liberty] [and must be promptly brought before the appropriate judicial authority of the State in which the warrant is executed. The national judicial authority shall ensure that the warrant does, in fact, apply to that person and that it meets the formal requirements laid down in this Statute];

(b) in any other case, the confirmed indictment;

(c) a statement of the [accused's] [arrested person's] rights under [articles 26 or 41 of] this Statute [, as applicable].

36/ Questions under this topic include: (a) what should be provided to the accused and his counsel; (b) who informs the accused of the charges against him before and after the indictment; (c) who should be notified; (d) when should notification be provided?

[2. The States Parties listed in the Prosecutor's request shall be notified of a warrant issued by the Preliminary Investigations Chamber. The warrant shall take effect as soon as it is brought to the attention of the person concerned by the national authorities charged with executing it.]

3. Option 1:

In any case to which paragraph (1) (a) applies, the indictment shall be served on the accused as soon as possible after it has been confirmed.

Option 2:

The Registrar shall promptly inform the accused, the Prosecutor and the States which in accordance with titles ____ and ____ of this part 37/ have been charged with executing a warrant or asked to cooperate and either the State which lodged the complaint under article ____ 38/ or the Security Council, if the matter was submitted to the Court under article ____, 39/ of the Preliminary Investigations Chamber's decision.

If the accused is already in custody under a warrant of arrest and detention, pursuant to article ____, 40/ the warrant of arrest and transfer shall replace the initial warrant. The warrant of arrest and transfer and the confirmed indictment shall be served on the accused in his place of detention. He shall be brought before the appropriate national judicial authority pursuant to article ____. 41/

If the accused is not in custody and his place of residence is known, he shall be arrested by the competent national authorities and brought before the appropriate national judicial authorities pursuant to article ____.] 42/

B. Rights of the suspect or accused related to notification 43/

1. [The accused is] [Anyone suspected of committing a crime within the meaning of this Statute shall be] entitled:

(a) to be informed promptly of the nature and cause of the charge against him or her [and be questioned in a language which he understands, and, to this end, to have the free assistance of a competent interpreter, and to be provided

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37/ Relating to "warrants of arrest or restrictions of liberty prior to the judgement" and "cooperation and judicial assistance", respectively.

38/ Relating to complaints submitted by States.

39/ Relating to referrals by the Security Council.

40/ Relating to pre-indictment arrest.

41/ See footnote 13.

42/ Ibid.

43/ Rights of suspects are generally dealt with under article 27 (6) while rights of the accused are generally treated under article 41. Accordingly, there is a question of whether instead of appearing under article 30, these provisions should be consolidated under articles 27 or 41, as appropriate.

free of charge with a translation of the documents on the basis of which he is being questioned or that show why a measure infringing upon his liberty or property has been proposed]; 44/

(b) [to have adequate time and facilities for the preparation of his or her defence and to communicate with counsel; [to be assisted promptly by a lawyer of his own choosing, or, if he does not have sufficient means to pay for one, by a lawyer appointed by the Preliminary Investigations Chamber of the Court;] 45/

(c) [before being questioned, or when a measure infringing upon his liberty or property has been proposed and brought to his attention, to be fully informed of the charges against him and the rights to which he is entitled under paragraph 1 of this article.]

C. Alternative means to personal service or notification

Option 1:

[If 60 days after the indictment has been confirmed, the accused is not in custody pursuant to a warrant issued under article ____, 46/ or for some reason the requirements of paragraph 1 cannot be complied with,] the [Presidency may] [Registrar shall], on application of the Prosecutor, [prescribe some other manner of bringing the indictment to the attention of the accused] [transmit to the national authorities of any State or States in whose territory the Prosecutor has reason to believe the accused may be found, for publication in newspapers having wide circulation in that territory, intimating to the accused that service of an indictment against him or her is sought].

Option 2:

If the accused is a fugitive, the warrant of arrest and transfer issued by the Preliminary Investigations Chamber shall have the effect of a warrant to search for the wanted person and shall be disseminated by all appropriate means. Once the accused is apprehended, the authorities shall proceed in accordance with [paragraph 3 of topic A above, option 2, last sentence].

[Note. In the case of a hearing by an indictment chamber, notification of the indictment takes a specific form which is reflected in the consolidation attempt of article 27.]

44/ As to the accused, compare with ILC article 41 (1) (a), (e); as to suspects, compare with ILC article 26 (6) (c).

45/ As to the accused, compare with ILC article 41 (1) (b); as to suspects, compare with ILC article 26 (6) (a) (ii).

46/ See footnote 13.

Article 31

Persons made available to assist in a prosecution [47]

ILC DRAFT

1. The Prosecutor may request a State party to make persons available to assist in a prosecution in accordance with paragraph 2.

2. Such persons should be available for the duration of the prosecution, unless otherwise agreed. They shall serve at the direction of the Prosecutor, and shall not seek or receive instructions from any Government or source other than the Prosecutor in relation to their exercise of functions under this article.

3. The terms and conditions on which persons may be made available under this article shall be approved by the Presidency on the recommendation of the Prosecutor.

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[47] This article was not considered by the informal working group on procedural questions, fair trial and rights of the accused, as it deals with other matters.

PART 5. THE TRIAL 48/

Article 32

Place of trial

I. ILC DRAFT

Unless otherwise decided by the Presidency, the place of the trial will be the seat of the Court.

II. PROPOSALS

Competent organ and criteria to decide the place of the trial

1. Unless otherwise decided in accordance with paragraph 2, the place of the trial will be the seat of the Court.

2. The [Presidency] [General Assembly of the States parties] may authorize the [Trial Chamber] [Court] to [exercise its functions at a place other than the seat of the Court] [sit in a State Party other than the host State] [for a particular case] [where it will ensure the efficient conduct of the trial and is in the interests of justice] [or] [when travel by the members of the Court is likely to make the proceedings simpler and less costly]. 49/

3. [(a)] The Presidency of the Court shall make inquiries with the State Party that appears likely to receive the Court.

[(b)] After the State Party likely to receive the Court has agreed, the decision [under the preceding paragraph] to hold a session away from the Court's seat shall be taken by the General Assembly of the States Parties, which shall be informed either by one of its members, the Presidency, the Prosecutor or the General Assembly of the Judges of the Court.]

4. With the express agreement of the State Party receiving the Court, the privileges, immunities and facilities provided for in article [23?] shall continue to be effective when the Court holds a session pursuant to [this article] [the three preceding paragraphs].

5. The provisions of this article shall also apply to non-party States which, after inquiries by the Presidency, state that they agree to receive the Court and to grant the privileges, immunities and facilities provided for in article [23?].

48/ See the note to Part 4.

49/ This raises a number of issues, including the need for agreement of States Parties or the host State for a trial chamber to exercise its functions away from the seat of the Court and whether authority to initiate such a step should rest with the President or the trial chamber.

Article 33 50/

Applicable law

ILC DRAFT

The Court shall apply:

(a) this Statute;

(b) applicable treaties and the principles and rules of general international law; and

(c) to the extent applicable, any rule of national law.

50/ This article was not considered by the informal working group on procedural questions, fair trial and rights of the accused, as it deals with other matters.

Article 34

Challenges to jurisdiction

I. ILC DRAFT

Challenges to the jurisdiction of the Court may be made, in accordance with the Rules:

(a) prior to or at the commencement of the hearing, by an accused or any interested State; and

(b) at any later stage of the trial, by an accused.

II. PROPOSALS

AUSTRALIA AND NETHERLANDS

Rule 78

General provisions

(A) After the initial appearance of the accused, either party may move before the Trial Chamber for appropriate relief or ruling. Such motions may be written or oral, at the discretion of the Trial Chamber.

(B) The Trial Chamber shall dispose of preliminary motions *in limine litis* and without interlocutory appeal, save in the following cases wherein the Chamber:

(i) dismisses an objection by the accused based on lack of jurisdiction;

(ii) dismisses all or part of an indictment which prohibits the Prosecutor from bringing new charges based on the acts underlying the dismissed indictment, or portion thereof;

(iii) excludes evidence and the Prosecutor represents to the Trial Chamber that the appeal is not taken for the purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding.

(C) The supplementary rules shall provide for matters such as the length, format and manner of service of preliminary motions where those motions are in written form.

Rule 79

Preliminary motions by accused

(A) Preliminary motions open to the accused shall include:

(i) objections based on lack of jurisdiction;

(ii) objections based on defects in the form of the indictment;

(iii) applications for the exclusion of evidence obtained from the accused or having belonged to him or her;

(iv) applications for severance under rule 64;

(v) objections based on the denial of request for assignment of counsel.

(B) Any of the motions by the accused referred to in subrule (A) shall be brought within sixty days after his or her initial appearance, and in any case before the hearing on the merits.

(C) Failure to apply within the time-limit prescribed shall constitute a waiver of the right. Upon a showing of good cause, the Trial Chamber may grant relief from the waiver.

[Note. Subrules (B) and (C) conflict with article 34 of the ILC draft Statute.]

Rule 80

Opportunity to respond

Upon the submission of a motion, the other party shall be afforded a reasonable opportunity to respond to it. The supplementary rules may set time-limits for responses.

Rule 81

Ruling on motions

Motions shall be decided as expeditiously as possible. A motion may be summarily denied on the grounds that insufficient allegations of fact or law have been set forth to justify further inquiry by the Trial Chamber.

ARGENTINA

Rule 61

(B) If the accused is detained at the disposal of the Court, or, being free, he or she voluntarily submits himself or herself to its jurisdiction, the Indictment Chamber shall notify the accused of the date set for the review of the indictment, and shall provide him or her with a copy of the indictment by the Prosecutor. On the day of the hearing, the Indictment Chamber shall listen to the accused, who shall be allowed to raise objections to the indictment, to point out any flaws it may contain, to criticize the material on which the indictment is based and to point out the evidence that he or she deems relevant to decide about the existence of a criminal case and which has been omitted by the Prosecutor. If this is the first time the accused presents himself or herself, he or she shall be allowed to bring any motions contained in rule 79 (A), or wait until the term of 60 days established in rule 79 (B) has elapsed.

FRANCE

Article 36

Verification of jurisdiction

The Court shall satisfy itself that it has jurisdiction in any case brought before it. Any State Party competent to institute proceedings in connection with all or part of the acts brought before the Court, and any person named in the document of submission to the Court, may challenge the jurisdiction of the Court. The forms and periods set out in article 39, paragraphs 2 and 3, shall apply.

Article 39

Challenge of a submission to the Court

1. The Prosecutor of the Court, before initiating an investigation, shall notify the States Parties of any matter submitted to the Court in accordance with articles 37 and 38. The States Parties shall so inform the persons referred to by name in the submission.

2. A State Party which wishes to continue to proceed with a prosecution or which has already proceeded with one in the case brought before the Court may then challenge the submission of the case within a period of one month after notification of the submission has been sent under paragraph 1 of this article. The person referred to by name in the submission may also dispute it under the same conditions.

As soon as the Court has received notice that the submission is being challenged under the preceding subparagraph, article 40, paragraph 2, shall apply.

3. The State Party or person challenging the submission to the Court may present his arguments either in writing or at a hearing held at his request. The Court may also decide of its own motion or at the request of the Prosecutor of the Court to hold such a hearing.

The decision shall be handed down by the Trial Chamber after it has heard the State or person disputing the submission and the Prosecutor. The State or person in question or the Prosecutor can appeal the decision handed down by the Trial Chamber before the Appeals Chamber.

The rules set forth in the preceding subparagraphs of this paragraph shall apply to any dispute brought before the Court under this article, during both the initial review of the dispute provided for in paragraph 6 of this article and the subsequent reviews provided for in paragraph 7 hereof.

4. The Court may decide, having regard to the principle of complementarity referred to in the preamble of this Statute, that a case brought before it is inadmissible for the reasons stated in article 35 (a), (b) and (c).

5. In every case, the State or person challenging a submission to the Court under paragraph 2 of this article shall provide all information concerning the conduct of the investigations and the judicial procedures which may support a finding of inadmissibility in the case submitted to the Court.

6. If the Court recognizes the plea of inadmissibility by the State or person challenging the submission on the grounds of article 35 (a), it shall declare the case before it provisionally inadmissible. In that event, the Prosecutor may question the State proceeding with the prosecution as to the status of the investigation and the action that will be taken on it.

If the Court recognizes the plea of inadmissibility by the State or person challenging the submission on the grounds of article 35 (b) or (c), it shall declare the case inadmissible.

7. In the case of the situation described in the first paragraph of paragraph 6 hereof, the Prosecutor may at any time refer back to the Court the same acts if it appears to him that the conditions required in article 35 (a) no longer exist. The Chamber which has made the initial finding that the Court lacks jurisdiction in the matter shall rule on the Prosecutor's request. After it has heard the arguments of the Prosecutor and the State or person concerned, it may either find that the conditions of article 35 (a) have been fulfilled or authorize the Prosecutor to initiate a prosecution in accordance with this Statute.

In the case of the situation envisaged in the second paragraph of paragraph 6 hereof, the Prosecutor of the Court may, if new facts arise, submit a request to the Court for a review of the decision of inadmissibility. The chamber which has handed down the initial decision of inadmissibility shall decide on the Prosecutor's request. After it has heard the arguments of the Prosecutor and the State or person concerned, it can either confirm its decision of inadmissibility or authorize the Prosecutor to initiate a prosecution before it in accordance with this Statute.

Article 69

Concurrent requests for transfer or extradition

1. The States Parties shall undertake to give priority to requests for transfer submitted by the Court over requests for extradition submitted by other States Parties.

2. If the State Party to which the request for transfer is addressed has also received a request for extradition from a State Party to which it is bound by an extradition agreement, it shall rule on that request for extradition, unless the Court, pursuant to article 39, has already rejected the challenge to submission to the Court made by the State requesting the extradition.

3. The State requesting the extradition may, if it has not already contested submission to the Court pursuant to article 39, request the Court to withdraw its request for transfer, on the basis of the principle of complementarity stated in the preamble to this Statute. The person named in the request for transfer may, under the same conditions, challenge submission to the Court and seek the withdrawal of the request for transfer.

Taking into account the facts and the identity of the persons named in the request for transfer, the Court shall rule in accordance with article 35, paragraphs (a) and (c), and article 39, paragraphs 3, 5, 6 and 7. The warrants issued earlier by the Court shall remain in force and the States parties shall be bound to cooperate.

4. If the State detaining the person concerned rejects the request for extradition, it shall so inform the Court without delay. The request referred to in paragraph 3 of this article shall then cease to have effect, and the Court shall note this fact in a decision.

5. If the Court decides not to grant the request submitted under paragraph 3 of this article, the Registrar shall immediately so inform the requested State, and the demand for extradition submitted by the requesting State shall cease to have effect. The person concerned shall then be transferred to the Court as soon as possible.

6. If the State detaining the person concerned decides to grant the request for extradition before the Court has finally ruled on the request submitted under paragraph 3 of this article, it may either keep the person concerned at its disposal or transfer him to the Court, in which case it shall notify its decision in favour of extradition to the requesting State and to the Court.

If the Court subsequently accepts the request submitted by the requesting State in accordance with paragraph 3 of this article and if the person concerned has been transferred to it pursuant to the preceding paragraph, it shall order the return of the person concerned to that State.

For the purposes of prosecution the requesting State shall be bound by the decision on extradition taken by the requested State and by all other provisions of the extradition treaty between the two States. The duration of the person's detention in the requested State and at the seat of the Court or in the place which it specifies shall be deducted in full from any sentence imposed in that requesting State.

7. If the State party requested to make a transfer to the Court has also received a request for extradition from a State non-party but one to which it is bound by an extradition agreement, it shall rule as in the case of concurrent requests for extradition, taking into account the following circumstances:

- The respective dates of the requests;
- The respective seriousness of the offences in question, with priority given to the request based on the most serious offences;
- The possibility that an agreement may be concluded between the State non-party requesting the extradition and the Court providing either that, following his trial by that State or after he has served his sentence, the person concerned may be transferred to the Court, or that the Court agrees to return him temporarily to the State requesting his extradition after having tried him, in order that that State may try him in turn or have him serve his sentence.

Article 107

Notification of the indictment to the States Parties for the purpose of challenging the submission of the case to the Court

1. At least three months before the date of opening of the trial, the Registrar shall notify the States Parties of the confirmed indictments and shall inform them that they are allowed a period of one month from the date of such notification in which to advise him if they challenge the submission of the case to the Court.

2. If a State has declared its intention to challenge the submission of the case to the Court, under articles 115 and 116, and within the time-limit laid down in the preceding paragraph, the prosecutor shall notify to the State the date on which the trial is to be held, such notification to be given at least two months before that date.

Article 115

Challenging of submission of the case to the Trial Chamber

Upon the opening of the trial, and in accordance with the procedure laid down in article 116, the right to challenge submission of the case to the Court lies with the accused and with the State which has already exercised its jurisdiction, provided the accused and the State in question have not previously challenged the submission to the Court.

Article 116

Challenge procedure

1. At the opening of the trial, following completion of the formalities provided for in article 113, the accused and the States that have indicated their wish to challenge submission of the case to the Court, in accordance with article 107, paragraph 2, may submit a memorandum raising the question of inadmissibility of a case of which the Court is seized, having regard to the principle of complementarity enunciated in the preamble to this Statute.

Submission of the case to the Court may not subsequently be challenged.

2. If an accused or a State challenges submission of the case to the Court, the Trial Chamber shall adjourn the trial until a final decision has been taken on the matter.

The Trial Chamber shall rule on the defence of inadmissibility. The hearing may take place immediately or at a later date set by the Chamber, either of its own motion or at the request of the prosecutor, the accused or the State challenging the submission to the Court.

3. During the hearing on the question of submission to the Court, the President of the Trial Chamber shall invite the accused or the State challenging submission to the Court to present their arguments, following which he shall request the prosecutor to present his observations.

4. The Prosecutor, the accused and the State that has challenged submission to the court may appeal the decision of the Trial Chamber to the Appeals Chamber.

5. At this stage of the proceedings, the Court may decide, having regard to the principle of complementarity enunciated in the preamble to this Statute, that the case brought before it is inadmissible on the ground that the accused has already been acquitted or convicted in final judgement within a State, in respect of the acts specified in the confirmed indictment, unless the proceedings took place in the State concerned in violation of the rules of international law with the aim of protecting the accused from criminal liability.

6. If the Court allows the defence of inadmissibility, it shall declare the case inadmissible and the trial initiated in accordance with this title may not proceed. The case may be declared partly inadmissible, in which case the trial may proceed in respect of the acts and of the accused that do not fall under the provisions of paragraph 5 of the present article.

AUSTRIA

Article 34

"...

(a) ...

(b) ..., by an accused or any State concerned only upon production of new relevant facts."

SWITZERLAND

Challenges to the jurisdiction of the Court may be made, under the conditions laid down in the rules, prior to or at the commencement of the hearing, by an accused or interested State.

Preparatory Committee (spring session)

(2) (An application by the accused or) a request by a State (OR an interested State) to the Court to declare a case inadmissible under paragraph 1 may be made at any time before (or at the commencement of) the trial (and must give reasons). (The accused may bring a challenge only after indictment and only on the grounds specified in article 35 (1) (c).)

Article 35 51/

Issues of admissibility

I. ILC DRAFT

The Court may, on application by the accused or at the request of an interested State at any time prior to the commencement of the trial, or of its own motion, decide, having regard to the purposes of this Statute set out in the preamble, that a case before it is inadmissible on the ground that the crime in question:

(a) has been duly investigated by a State with jurisdiction over it, and the decision of that State not to proceed to a prosecution is apparently well-founded;

(b) is under investigation by a State which has or may have jurisdiction over it, and there is no reason for the Court to take any further action for the time being with respect to the crime; or

(c) is not of such gravity to justify further action by the Court.

II. PROPOSALS

FRANCE

Article 36

Verification of jurisdiction

The Court shall satisfy itself that it has jurisdiction in any case brought before it. Any State Party competent to institute proceedings in connection with all or part of the acts brought before the Court, and any person named in the document of submission to the Court, may challenge the jurisdiction of the Court. The forms and periods set out in article 39, paragraphs 2 and 3, shall apply.

51/ Only procedural issues are discussed by the informal group. Issues of complementarity in the context of this article are not considered here.

Article 36

Procedure under articles 34 and 35

I. ILC DRAFT

1. In proceedings under articles 34 and 35, the accused and the complainant State have the right to be heard.

2. Proceedings under articles 34 and 35 shall be decided by the Trial Chamber, unless it considers, having regard to the importance of the issues involved, that the matter should be referred to the Appeals Chamber.

II. PROPOSALS

AUSTRALIA AND NETHERLANDS

Rule 78

(B) The Trial Chamber shall dispose of preliminary motions in limine litis and without interlocutory appeal, save in the following cases wherein the Chamber:

(i) dismisses an objection by the accused based on lack of jurisdiction;

(ii) dismisses all or part of an indictment which prohibits the Prosecutor from bringing new charges based on the acts underlying the dismissed indictment, or portion thereof;

(iii) excludes evidence and the Prosecutor represents to the Trial Chamber that the appeal is not taken for the purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding.

Rule 128

Interlocutory appeals

(A) Subject to subrule (B), a party seeking to make an interlocutory appeal as permitted by subrule 78 (B) shall not more than ten days from the date on which the Trial Chamber ruled on the preliminary motion, file with the Registrar and serve upon the other party a written notice of interlocutory appeal, setting forth the grounds. The supplementary rules shall provide for the form and any related requirements of an interlocutory notice of appeal.

(B) The Appeals Chamber may extend the period up to an additional five days for good cause.

[Note. This rule needs further elaboration. The matter might also need to be addressed in the Statute.]

Article 39

Challenge of a submission to the Court

1. The Prosecutor of the Court, before initiating an investigation, shall notify the States Parties of any matter submitted to the Court in accordance with articles 37 and 38. The States Parties shall so inform the persons referred to by name in the submission.

2. A State Party which wishes to continue to proceed with a prosecution or which has already proceeded with one in the case brought before the Court may then challenge the submission of the case within a period of one month after notification of the submission has been sent under paragraph 1 of this article. The person referred to by name in the submission may also dispute it under the same conditions.

As soon as the Court has received notice that the submission is being challenged under the preceding subparagraph, article 40, paragraph 2, shall apply.

3. The State Party or person challenging the submission to the Court may present his arguments either in writing or at a hearing held at his request. The Court may also decide of its own motion or at the request of the Prosecutor of the Court to hold such a hearing.

The decision shall be handed down by the Trial Chamber after it has heard the State or person disputing the submission and the Prosecutor. The State or person in question or the Prosecutor can appeal the decision handed down by the Trial Chamber before the Appeals Chamber.

The rules set forth in the preceding subparagraphs of this paragraph shall apply to any dispute brought before the Court under this article, during both the initial review of the dispute provided for in paragraph 6 of this article and the subsequent reviews provided for in paragraph 7 hereof.

4. The Court may decide, having regard to the principle of complementarity referred to in the preamble of this Statute, that a case brought before it is inadmissible for the reasons stated in article 35 (a), (b) and (c).

5. In every case, the State or person challenging a submission to the Court under paragraph 2 of this article shall provide all information concerning the conduct of the investigations and the judicial procedures which may support a finding of inadmissibility in the case submitted to the Court.

6. If the Court recognizes the plea of inadmissibility by the State or person challenging the submission on the grounds of article 35 (a), it shall declare the case before it provisionally inadmissible. In that event, the Prosecutor may question the State proceeding with the prosecution as to the status of the investigation and the action that will be taken on it.

If the Court recognizes the plea of inadmissibility by the State or person challenging the submission on the grounds of article 35 (b) or (c), it shall declare the case inadmissible.

7. In the case of the situation described in the first paragraph of paragraph 6 hereof, the Prosecutor may at any time refer back to the Court the same acts if it appears to him that the conditions required in article 35 (a) no longer exist. The Chamber which has made the initial finding that the Court lacks jurisdiction in the matter shall rule on the Prosecutor's request. After it has heard the arguments of the Prosecutor and the State or person concerned, it may either find that the conditions of article 35 (a) have been fulfilled or authorize the Prosecutor to initiate a prosecution in accordance with this Statute.

In the case of the situation envisaged in the second paragraph of paragraph 6 hereof, the Prosecutor of the Court may, if new facts arise, submit a request to the Court for a review of the decision of inadmissibility. The chamber which has handed down the initial decision of inadmissibility shall decide on the Prosecutor's request. After it has heard the arguments of the Prosecutor and the State or person concerned, it can either confirm its decision of inadmissibility or authorize the Prosecutor to initiate a prosecution before it in accordance with this Statute.

Article 69

3. The State requesting the extradition may, if it has not already contested submission to the Court pursuant to article 39, request the Court to withdraw its request for transfer, on the basis of the principle of complementarity stated in the preamble to this Statute. The person named in the request for transfer may, under the same conditions, challenge submission to the Court and seek the withdrawal of the request for transfer.

Taking into account the facts and the identity of the persons named in the request for transfer, the Court shall rule in accordance with article 35, paragraph (a) and (c), and article 39, paragraphs 3, 5, 6 and 7. The warrants issued earlier by the Court shall remain in force and the States Parties shall be bound to cooperate.

Article 70

Request for transfer addressed to a State which invokes the principle of complementarity

1. A State Party which brings a prosecution in respect of the facts referred to in the request for transfer addressed to it by the Court, or which had already tried the person named in that request and which has not challenged submission to the Court under article 39, may request the Court to withdraw its request for transfer, on the basis of the principle of complementarity stated in the preamble to this Statute. The person named in the request for transfer may, under the same conditions, challenge submission to the Court and seek the withdrawal of the request for transfer.

The State shall notify the Court which, taking into consideration the facts and the identity of the persons named in the request for transfer, shall rule in accordance with the provisions of article 35, paragraphs (a) and (c), and article 39, paragraphs 3, 5, 6 and 7. Warrants issued subsequently by the Court shall remain in force, and the State Parties shall be bound to cooperate.

2. The persons named in a request for transfer addressed to a State which challenges submission to the Court under paragraph 1 of this article shall in no circumstances be placed in detention at the request of the Court before it has finally ruled on submission.

At the request of the Prosecutor of the Court, the Preliminary Investigations Chamber may nevertheless issue against such persons a warrant for judicial supervision, in order, inter alia, to prevent them leaving the territory of the requested State before the Court has finally ruled on submission.

Article 116

Challenge procedure

1. At the opening of the trial, following completion of the formalities provided for in article 113, the accused and the States that have indicated their wish to challenge submission of the case to the Court, in accordance with article 107, paragraph 2, may submit a memorandum raising the question of inadmissibility of a case of which the Court is seized, having regard to the principle of complementarity enunciated in the preamble to this Statute.

Submission of the case to the Court may not subsequently be challenged.

2. If an accused or a State challenges submission of the case to the Court, the Trial Chamber shall adjourn the trial until a final decision has been taken on the matter.

The Trial Chamber shall rule on the defence of inadmissibility. The hearing may take place immediately or at a later date set by the Chamber, either of its own motion or at the request of the Prosecutor, the accused or the State challenging the submission to the Court.

3. During the hearing on the question of submission to the Court, the President of the Trial Chamber shall invite the accused or the State challenging submission to the Court to present their arguments, following which he shall request the prosecutor to present his observations.

4. The Prosecutor, the accused and the State that has challenged submission to the court may appeal the decision of the Trial Chamber to the Appeals Chamber.

5. At this stage of the proceedings, the Court may decide, having regard to the principle of complementarity enunciated in the preamble to this Statute, that the case brought before it is inadmissible on the ground that the accused has already been acquitted or convicted in final judgement within a State, in respect of the acts specified in the confirmed indictment, unless the proceedings took place in the State concerned in violation of the rules of international law with the aim of protecting the accused from criminal liability.

6. If the Court allows the defence of inadmissibility, it shall declare the case inadmissible and the trial initiated in accordance with this title may not proceed. The case may be declared partly inadmissible, in which case the trial may proceed in respect of the acts and of the accused that do not fall under the provisions of paragraph 5 of the present article.

AUSTRIA

Article 36

(2) "Proceedings under articles 34 (a) and 35 shall be decided by the Indictment Chamber, under article 34 (b) by the Trial Chamber, unless ..."

SWITZERLAND

Article 36, paragraph 2

1. Proceedings under articles 34 and 35 shall be decided by the Trial Chamber to which the matter has been submitted prior to its examination of the issues involved.

2. The accused, the Prosecutor and the interested States may appeal against this decision in accordance with the procedure provided for in article 48 and the following articles.

Preparatory Committee (spring session)

Article 36

(3) In cases where the jurisdiction of the Court is called into question, the proceedings shall be interrupted until the competent chamber has reached its decision on this point.

Requirement of super-majority

Preparatory Committee (spring session)

Article 35

((4) A vote of two thirds of the members of the Court shall be required before the Prosecutor can investigate and prosecute a case under article 35 (1) (c).)

Article 37

Trial in the presence of the accused

I. ILC DRAFT

1. As a general rule, the accused should be present during the trial.

2. The Trial Chamber may order that the trial proceed in the absence of the accused if:

(a) the accused is in custody, or has been released pending trial, and for reasons of security or the ill-health of the accused it is undesirable for the accused to be present;

(b) the accused is continuing to disrupt the trial; or

(c) the accused has escaped from lawful custody under this Statute or has broken bail.

3. The Chamber shall, if it makes an order under paragraph 2, ensure that the rights of the accused under this Statute are respected, and in particular:

(a) that all reasonable steps have been taken to inform the accused of the charge; and

(b) that the accused is legally represented, if necessary by a lawyer appointed by the Court.

4. In cases where a trial cannot be held because of the deliberate absence of an accused, the Court may establish, in accordance with the Rules, an Indictment Chamber for the purpose of:

(a) recording the evidence;

(b) considering whether the evidence establishes a prima facie case of a crime within the jurisdiction of the Court; and

(c) issuing and publishing a warrant of arrest in respect of an accused against whom a prima facie case is established.

5. If the accused is subsequently tried under this Statute:

(a) the record of evidence before the Indictment Chamber shall be admissible;

(b) any judge who was a member of the Indictment Chamber may not be a member of the Trial Chamber.

II. PROPOSALS

A. Scope of general rule and exceptions

1. [As a general rule, the accused should be present during the trial.] [The accused shall be present during the trial] [The trial shall not be held if the accused is not present].

[2. The Trial Chamber may [exceptionally and by a specially reasoned decision] [in the interests of justice] [having heard such submissions and evidence as it deems necessary] [proprio motu or at the request of either party] order that the trial proceed in the absence of the accused, if the accused:

(a) [is in custody, or has been released pending trial, and for reasons of security or the ill-health of the accused it is undesirable for the accused to be present] [because of his state of health, requests that he be excused from appearing and the Chamber considers that his presence is not essential to the holding of the trial. In this case, the Chamber may appoint one of its members to hear the accused at his place of residence or in the local prison where he is held after his defense counsel has been duly notified. The judge so appointed, assisted by the Registrar, shall examine the accused. The Prosecutor and the counsel of the parties may also put questions to him by requesting authorization to do so from the appointed judge. The Registrar shall prepare a record of the examination of the accused and shall transmit it as soon as possible to the Trial Chamber];

(b) [is continuing to disrupt the trial] [disrupts the trial or refuses to appear. In this case, the accused shall, until the end of the trial, be held at the disposal of the Chamber by the police. After each hearing, the Registrar shall read the record of the deliberations to the accused and deliver to him a copy of the submissions by the prosecutor and of the judgements given by the Trial Chamber];

(c) [has escaped from lawful custody under this Statute or has broken bail]; or

(d) [under detention has, when summoned for the date of trial, refused to appear without good reason, and made it particularly difficult to bring him to the Court];

(e) [has failed to appear for trial and all reasonable steps have been taken to inform the accused of the charge.]

Another alternative

If the accused is at liberty, he must give himself up no later than the day before the trial; he may, however, apply to the President of the Trial Chamber for exemption from this requirement. He shall be informed of the decision of the President by any available means. The accused shall be warned that, in the event of his failure to present himself for the opening of the trial, he will be tried *in absentia* in accordance with the provisions of paragraph 4 of this article. There shall be no appeal against denial of such exemption by the President.

If the accused has been placed under judicial supervision by the Trial Chamber, this supervision shall continue in force until such time as the accused gives himself up or, if he is exempted from the requirement to give himself up, until such time as the Trial Court takes the decision referred to in article 100.

If the accused does not give himself up in accordance with the provisions of paragraph 1, or, if he has been exempted from the requirement to give himself up, does not present himself at the opening of the trial, or if he escapes during the course of the trial before the Chamber has withdrawn to deliberate, the Trial Chamber may issue a warrant requiring that he be sought, arrested and transferred. This warrant must contain a statement of the acts referred to in the decision confirming the indictment for the offence specified in the decision.

This warrant shall be circulated by the Registrar of the Court by any appropriate means; if the accused is found, he shall be served with the warrant and shall be informed of the confirmed indictment if this has not already been done. He shall be brought before the competent national authority, which shall proceed in accordance with article 55, paragraph 3. The accused shall be placed in detention and transferred as soon as possible to the local prison closest to the seat of the Court, or to any other place specified by the Court, in the manner provided for in Part 4, Title III, of this Statute, with a view to being brought before the Trial Chamber.

If the accused has not given himself up on the day before the trial in accordance with the provisions of paragraph 1, or if he was exempted from the requirement to give himself up but did not present himself at the opening of the trial, or if he escapes during the trial before the Chamber retires for deliberation, and he still cannot be found, he may be tried in absentia upon the express application of the prosecutor.

The Trial Chamber shall issue a warrant for the arrest and transfer of the accused for the purpose of enforcement of its judgement. This warrant, which shall replace any previous warrant, shall be executed in accordance with the provisions of Part 4, Title II, of this Statute.]

B. Rights of the accused

3. The Chamber shall, if it makes an order under paragraph 2, ensure that the rights of the accused under this Statute [and the rules] are respected [, and in particular:

(a) that all reasonable steps have been taken to inform the accused of the charge; and

(b) that the accused is legally represented, if necessary by a lawyer appointed by the Court.]

C. Proceedings to preserve evidence and to issue international warrants 52/

4. Option 1

An exception shall be made in the case of measures for recording the evidence.

Option 2

In cases where a trial cannot be held because of the deliberate absence of an accused, the court may establish, in accordance with the rules, an Indictment Chamber for the purpose of:

(a) recording the evidence;

(b) considering whether the evidence establishes a prima facie case of a crime within the jurisdiction of the Court; and

(c) issuing and publishing a warrant of arrest in respect of an accused against whom a prima facie case is established.

Option 3

When the Preliminary Investigations Chamber proposes to confirm an indictment, but one or more of the persons named in the indictment has fled or cannot be found, it may still hold a hearing under the conditions provided for in article ___. 53/

When it confirms the indictment, in whole or in part, against a person who has fled or cannot be found, the Preliminary Investigations Chamber shall issue a warrant to search for, arrest and transfer the accused, which is tantamount to committing him to the Trial Chamber for trial. This warrant must contain, in addition to the particulars listed in article ___, 54/ the statement of facts referred to in the confirmation decision, with the characterization accepted in that decision.

The warrant shall be disseminated by the Registrar using all appropriate means. When the person is found, the warrant shall be executed as a warrant of arrest and transfer, in accordance with the provisions of title ___ of this part. 55/

D. Subsequent trial

5. Option 1

If the accused is subsequently tried under this Statute:

52/ An important question here is how to control the recording of evidence in order to prevent prejudice to the accused at the time of trial.

53/ Relating to confirmation of the indictment.

54/ Relating to formal requirements for the issuance of an arrest warrant.

55/ Relating to arrest or restrictions of liberty prior to judgement.

(a) the record of evidence before the Indictment Chamber shall be admissible;

(b) any judge who was a member of the Indictment Chamber may not be a member of the Trial Chamber.

Option 2

If an accused person tried in absentia under the provisions of this article gives himself up or is arrested, the decision taken in absentia by the Trial Chamber shall be void in all its provisions and the accused shall be retried, except in the case provided for in paragraph 7.

However, the accused may accept the decision if the sentence pronounced is one of imprisonment for not more than 10 years. Such acceptance must be recorded, in the presence of defense counsel, appointed by the accused or by the court at his request, by the President of the Trial Chamber or by any judge appointed by him.

The Trial Chamber may allow the accused to be represented by counsel whom he has appointed. In this case, the accused shall be tried in absentia, but the Trial Chamber shall inform the defense counsel of the accused that the latter may not be retried.

Option 3

In case an accused has been tried in absentia in accordance with this article, the Trial Chamber may, according to circumstances, admit an authorized representative to appear on trial to plea for the accused. In case the accused still appears pending procedures, the Trial Chamber shall recommence the trial entirely.

Article 38

Functions and powers of the Trial Chamber

A. Procedures related to the commencement of the trial

I. ILC DRAFT

1. At the commencement of the trial, the Trial Chamber shall:

(a) have the indictment read;

(b) ensure that articles 27 (5) (b) and 30 have been complied with sufficiently in advance of the trial to enable adequate preparation of the defence;

(c) satisfy itself that the other rights of the accused under this Statute have been respected.

II. PROPOSALS

AUSTRALIA AND NETHERLANDS

Rule 74

Initial appearance of accused

Upon his or her transfer to the seat of the Court or where the trial is to be held, the accused shall be brought before the Trial Chamber established by the Presidency under article X (A 27 ILC) of the Statute without delay, and shall be formally charged. The Trial Chamber shall:

(i) satisfy itself that the right of the accused to counsel is respected;

(ii) read or have the indictment read to the accused in a language he or she speaks and understands, and satisfy itself that the accused understands the indictment;

(iii) call upon the accused to enter a plea of guilty or not guilty on each count; and should the accused fail to do so, enter a plea of guilty on his or her behalf;

(iv) in the case of a plea of not guilty, instruct the Registrar to set a date for trial;

(v) in the case of a plea of guilty, instruct the Registrar to set a date for the pre-sentencing hearing under rule 118;

(vi) instruct the Registrar to set such other dates as appropriate.

[Note. A number of issues are raised by this rule which flow from the different approaches taken under the common law and civil law systems. For example, civil law systems do not make provision for guilty pleas. The proposal that a guilty plea would lead directly to a pre-sentencing hearing would also raise concerns from the perspective of a civil law system.]

Rule 78

General provisions

(A) After the initial appearance of the accused, either party may move before the Trial Chamber for appropriate relief or ruling. Such motions may be written or oral, at the discretion of the Trial Chamber.

(B) The Trial Chamber shall dispose of preliminary motions in limine litis and without interlocutory appeal, save in the following cases wherein the Chamber:

(i) dismisses an objection by the accused based on lack of jurisdiction;

(ii) dismisses all or part of an indictment which prohibits the Prosecutor from bringing new charges based on the acts underlying the dismissed indictment, or portion thereof;

(iii) excludes evidence and the Prosecutor represents to the Trial Chamber that the appeal is not taken for the purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding.

(C) The supplementary rules shall provide for matters such as the length, format and manner of service of preliminary motions where those motions are in written form.

FRANCE

Article 98

Submission to the Trial Chamber

The Trial Chamber shall have jurisdiction over accused persons brought before it by a decision of the Preliminary Investigations Chamber taken under the provisions of article 48, paragraph 6, and article 49, paragraph 2.

Article 113

Opening of trial

At the opening of the trial, the President of the Chamber shall:

(a) examine the accused in order to verify his identity;

(b) ensure that the accused has actually been notified of the confirmed indictment and has since then been allowed adequate time and facilities for the preparation of his defence;

(c) ensure that a defence counsel for the accused is present. If the accused has no counsel, the President of the Chamber shall appoint one of his own motion;

(d) ensure that the accused understands and speaks the language employed at the hearing. Should this not be the case, the accused shall be entitled to be assisted free of charge by an interpreter appointed by the President of the Trial Chamber;

(e) have the confirmed indictment read out.

TITLE II. FORMALITIES PRIOR TO THE OPENING OF THE TRIAL

Article 106

Summons for the accused to appear

The Registrar of the Court shall inform the accused of the date of opening of the trial at least two months before that date.

Article 107

Notification of the indictment to the States Parties for the purpose of challenging the submission of the case to the Court

1. At least three months before the date of opening of the trial, the Registrar shall notify the States Parties of the confirmed indictments and shall inform them that they are allowed a period of one month from the date of such notification in which to advise him if they challenge the submission of the case to the Court.

2. If a State has declared its intention to challenge the submission of the case to the Court, under articles 115 and 116, and within the time limit laid down in the preceding paragraph, the Prosecutor shall notify to the State the date on which the trial is to be held, such notification to be given at least two months before that date.

Article 108

Summoning of witnesses and experts

1. The Prosecutor shall communicate to the accused and the accused shall communicate to the Prosecutor, as soon as possible and in any event within 15 days of the opening of the trial, the list of persons they wish to have heard as witnesses or experts in support of the evidence obtained during the investigation.

The communication shall indicate the name, forename, occupation and place of residence of such witnesses or experts.

2. Upon application by the accused, the Prosecutor shall, at least one month before the beginning of the trial, summon to appear the witnesses and experts the list of whom has been communicated to him by the accused. This list may not include more than 10 names.

Further witnesses or experts or witnesses or experts whose names were communicated to the prosecutor after the time limit shall, at the request of the accused and at his expense, be summoned to appear. However, if the accused does not have sufficient resources to bear the cost of their appearance, he may request the Trial Chamber to summon, upon his petition, further witnesses or experts. The Trial Chamber shall determine by a non-appealable decision whether the appearance of the persons concerned will be useful in ascertaining the true facts.

TITLE III. CONDUCT OF THE TRIAL

Article 109

Assistance by a Registrar

During the trial, the Trial Chamber shall have the assistance of a Registrar.

Article 110

Means of constraint

Means of constraint, such as handcuffs, shall not be used except to avoid a risk of escape during transfer or for reasons of security; they shall be removed when the accused appears before the Trial Chamber.

1 (a). Guilty plea

ARGENTINA

Rule 74

...

(iii) [The Trial Chamber] shall request the accused, once all counts have been read, to say whatever he or she deems convenient about the indictment and the counts he or she is being indicted for;

(iv) If the accused admits the facts he or she is being indicted for, [the Trial Chamber] shall order the trial to be carried out pursuant to the abbreviated proceedings established in rule 145 and instruct the Registrar to set a date for the hearing;

(v) In any other case, once the accused has been heard, [the Trial Chamber] shall instruct the Registrar to set a date for the trial;

(vi) [The Trial Chamber] shall instruct the Registrar to set such other dates as appropriate.

ARGENTINA AND CANADA

1. Amend article 38, paragraph 1 (d), to read:

> "(d) allow the accused to enter a plea of not guilty or to make an admission of guilt before the Trial Chamber."

2. Add a new article 38 bis:

"Article 38 bis

"Abbreviated proceedings on an admission of guilt

"1. Where the accused makes an admission of guilt under article 38, paragraph 1 (d), the Trial Chamber shall determine whether:

(a) the accused appreciates the nature and consequences of the admission of guilt and whether the admission is voluntarily made; and

(b) the admission of guilt is firmly supported by the facts of the case that are contained in:

(i) the indictment and in any supplementary materials presented by the Prosecutor, and which the accused admits; and

(ii) any other evidence, including the testimony of witnesses, presented by the Prosecutor or the accused.

"2. Where the Trial Chamber is satisfied that the natters referred to in paragraph 1 are established, the Trial Chamber shall consider the admission of guilt as an admission of all the essential facts that are required to prove the crime to which the admission of guilt relates, and may convict the accused of that crime.

"3. Where the Trial Chamber is not satisfied that the matters referred to in paragraph 1 are established, the Trial Chamber shall order that the trial be continued under the ordinary trial procedures provided by this Statute, and shall consider the admission of guilt not to have been made.

"4. Where the Trial Chamber is of the opinion that a more complete presentation of the facts of the case is otherwise required in the interests of justice, the Trial Chamber may request that the Prosecutor present additional evidence, including the testimony of witnesses, or may order that the trial be continued under the ordinary trial procedures provided by this Statute and, in the latter situation, shall consider the admission of guilt not to have been made."

B. Rights of the accused/witnesses/victims

I. ILC DRAFT

2. The Chamber shall ensure that a trial is fair and expeditious and is conducted in accordance with this Statute and the rules, with full respect for the rights of the accused and due regard for the protection of victims and witnesses.

II. PROPOSALS

AUSTRALIA AND NETHERLANDS

Rule 75

Questioning of accused

After the initial appearance of the accused the Prosecutor shall not question him or her unless his or her counsel is present and the questioning is tape-recorded or video-recorded in accordance with the procedure provided for in rules 58 and 59. The Prosecutor shall at the beginning of the questioning caution the accused that he or she is not obliged to say anything unless he or she wishes to do so but that whatever he or she says may be given in evidence.

ARGENTINA

Rule 100

(C) The accused shall be able to declare in his or her defence, should he or she wish to do so. If this were the case, the provisions of rules 57 *bis* and 75 shall be applicable.

FRANCE

Article 101

Rights of the accused

The accused shall enjoy the rights afforded to suspects under article 51, paragraph 1. He shall also be entitled:

- to a fair hearing by an independent and impartial tribunal. Subject to the provisions of article 104, the hearing shall be public;

- to have adequate time and facilities for the preparation of his defence;

- to be tried without undue delay;

- to examine or have examined the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

- to have communicated to him all evidence submitted to the Court.

Article 127

Consideration of decisions

Following the submission by the Prosecutor and the pleadings of the accused, the President shall declare the deliberations concluded and the Chamber shall withdraw to deliberate in camera.

The accused shall be found guilty only if the majority of the Trial Chamber considers that his guilt has been proved beyond reasonable doubt.

The Trial Chamber shall pronounce its finding separately for each charge in the indictment. If several accused are tried together, the Chamber shall rule separately on the case of each one of them.

If the Trial Chamber finds the accused guilty, it shall decide on the sentence by majority vote.

Where necessary, it shall also establish principles relating to compensation for damage caused to the victims and to restitution of property unlawfully acquired by the persons convicted.

The manner in which the decisions of the Trial Chamber are taken shall be covered by the confidentiality of deliberations.

C. Disclosure of evidence

PROPOSALS

AUSTRALIA AND NETHERLANDS

SECTION 4. DISCLOSURE OF EVIDENCE

Rule 82

Disclosure by the Prosecutor

(A) The Prosecutor shall make available to the defence, as soon as practicable after the initial appearance of the accused, copies of the supporting material which accompanied the indictment when confirmation was sought as well as all prior statements obtained by the Prosecutor from the accused or from prosecution witnesses.

(B) The Prosecutor shall on request, subject to subrule (C), permit the defence to inspect any books, documents, photographs and tangible objects in his or her custody or control, which are material to the preparation of the defence, or are intended for use by the Prosecutor as evidence at trial or were obtained from or belonged to the accused.

(C) Where information is in the possession of the Prosecutor, the disclosure of which may prejudice further or ongoing investigations, or for any other reasons may be contrary to the public interest or affect the security interests of any State, the Prosecutor may apply to the Trial Chamber sitting in camera to be relieved from the obligation to disclose pursuant to subrule (B). When making such application the Prosecutor shall provide the Trial Chamber (but only the Trial Chamber) with the information that is sought to be kept confidential.

(D) Information subject to an order of the Trial Chamber pursuant to subrule (C) must be subsequently disclosed if it is intended to be used as evidence at trial.

[Note. The requirement of disclosure throws up a number of important issues. One relates to the need to ensure that the rights of the accused are not prejudiced through limiting the duty on the Prosecutor to disclose information. There is also the matter of protecting sensitive information supplied by States to the Prosecutor. In this regard, should the relevant State have standing to argue for the non-disclosure of information it has supplied to the Prosecutor? It should be noted that the approach taken in this rule conflicts with aspects of article 27 (5) of the ILC draft Statute.]

Rule 83

Reciprocal disclosure

(A) As early as reasonably practicable and in any event prior to the commencement of the trial:

(i) The Prosecutor shall notify the defence of the names of the witnesses that he or she intends to call in proof of the guilt of the accused and in rebuttal of any defence plea of which the Prosecutor has received notice in accordance with (ii) below;

(ii) The defence shall notify the Prosecutor of its intent to offer:

(a) the defence of alibi; in which case the notification shall specify the place or places at which the accused claims to have been present at the time of the alleged crime and the names and addresses of witnesses and any other evidence upon which the accused intends to rely to establish the alibi;

(b) any special defence, including those of (defences to be identified); in which case the notification shall specify the names and addresses of witnesses and any other evidence upon which the accused intends to rely to establish the special defence.

(B) Failure of the defence to provide notice under this rule shall not limit the right of the accused to testify on the above defences.

(C) If the defence makes a request pursuant to subrule (B) of rule 82, the Prosecutor shall be entitled to inspect any books, documents, photographs and tangible objects, which are within the custody or control of the defence and which it intends to use as evidence at the trial.

Rule 84

Disclosure of exculpatory evidence

(A) The Prosecutor shall, as soon as practicable, disclose to the defence the existence of evidence known to the Prosecutor which in any way tends to suggest the innocence or mitigate the guilt of the accused or may affect the credibility of prosecution evidence.

(B) The Prosecutor may request an ex parte hearing in camera before the Trial Chamber for the purpose of obtaining a ruling on whether or not particular evidence falls within the category of exculpatory evidence.

Rule 85

Continuing duty to disclose

(A) The duty to disclose is ongoing for both parties.

(B) If either party discovers additional evidence or material which should have been produced earlier pursuant to the rules, that party shall promptly notify the other party and the Trial Chamber of the existence of the additional evidence or material.

[Note. The issue of sanctions for non-disclosure needs to be addressed.]

Rule 86

Protection of victims and witnesses

(A) In exceptional circumstances, the Prosecutor may apply to a Trial Chamber to order the non-disclosure of the identity of a victim or witness who may be in danger or at risk until such person is brought under the protection of the Tribunal.

(B) In the determination of protective measures for victims and witnesses, the Trial Chamber may consult the Victims and Witnesses Unit.

(C) Subject to rule 95, the identity of the victim or witness shall be disclosed in sufficient time prior to the trial to allow adequate time for preparation of the defence.

[Note. The protection of victims and witnesses will be an important responsibility of the Court. The non-disclosure of the identity of victims and witnesses needs to be balanced against the right of an accused to prepare his or her defence.]

Rule 87

Matters not subject to disclosure

(A) Notwithstanding the provisions of rules 82 and 83 reports, memoranda, or other internal documents prepared by a party, its assistants or representatives in connection with the investigation or preparation of the case, are not subject to disclosure or notification under those rules.

(B) If the Prosecutor is in possession of information which has been provided to him or her on a confidential basis and which has been used solely for the purpose of generating new evidence, that initial information and its origin shall not be disclosed by the Prosecutor without the consent of the person or entity providing the initial information and shall in any event not be given in evidence without prior disclosure to the accused.

(C) If, after obtaining the consent of the person or entity providing information under this rule, the Prosecutor elects to present as evidence any testimony, document or other material so provided, the Trial Chamber, notwithstanding rule 116, may not order either party to produce additional evidence received from the person or entity providing the initial information, nor may the Trial Chamber for the purpose of obtaining such additional evidence itself summon that person or a representative of that entity as a witness or order their attendance.

(D) If the Prosecutor calls as a witness the person providing, or a representative of the entity providing, information under this rule, the Trial Chamber may not compel the witness to answer any question the witness declines to answer on grounds of confidentiality.

(E) The right of the accused to challenge the evidence presented by the Prosecution shall remain unaffected subject only to limitations contained in subrules (C) and (D).

(F) Nothing in subrule (C) or (D) above shall effect a Trial Chamber's power under subrule 105 (D) to exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial.

Rule 95

Measures for the protection of victims and witnesses

(A) As provided for in article X (A 38 (4), 43 ILC) of the Statute, a Trial Chamber may, proprio motu or at the request of either party, or of the victim or witness concerned, or of the Victims and Witnesses Unit, order appropriate measures for the privacy and protection of victims and witnesses, provided that the measures are consistent with the rights of the accused as provided for in the Statute and the rules, in particular the right to examine, or have examined, prosecution witnesses.

(B) A Trial Chamber may hold an in camera proceeding to determine whether to order:

(i) Measures to prevent disclosure to the public or the media of the identity or whereabouts of a victim or a witness, or of persons related to or associated with him or her by such means as:

  (a) expunging names and identifying information from the Chamber's public records;

  (b) non-disclosure to the public of any records identifying the victim;

  (c) giving of testimony through image or voice altering devices or closed circuit television;

  (d) assignment of a pseudonym;

(ii) Closed sessions, in accordance with rule 91;

(iii) Appropriate measures to facilitate the testimony of vulnerable victims and witnesses, such as one-way closed circuit television.

(C) A Trial Chamber shall, whenever necessary, control the manner of questioning to avoid any harassment or intimidation.

[Note. The power of the Trial Chamber to issue a protective order to ensure the safety and security of a particular victim or witness needs to be considered.]

D. Multiple accused and joinder of crimes

I. ILC DRAFT

3. The Chamber may, subject to the rules, hear charges against more than one accused arising out of the same factual situation.

II. PROPOSALS

AUSTRALIA AND NETHERLANDS

Rule 62

Joinder of accused

Persons accused of the same or different crimes committed in the course of the same transaction may be jointly charged and tried.

Rule 63

Joinder of crimes

Two or more crimes may be joined in one indictment if the series of acts committed together form the same transaction, and the said crimes were committed by the same accused.

Rule 92

Joint trials

In joint trials, each accused shall be accorded the same rights as if he or she were being tried separately.

E. Public v. closed proceedings

I. ILC DRAFT

4. The trial shall be held in public, unless the Chamber determines that certain proceedings be in closed session in accordance with article 43, or for the purpose of protecting confidential or sensitive information which is to be given in evidence.

II. PROPOSALS

AUSTRALIA AND NETHERLANDS

Rule 90

Open sessions

(A) All proceedings before a Trial Chamber, other than deliberations of the Chamber, shall be held in public, unless otherwise provided.

(B) Photography, video recording or audio recording of the trial, other than by the Registry under rule 98 is within the discretion of the Trial Chamber.

(C) In order to protect the accused's right to a fair trial or maintain the dignity and decorum of proceedings, the Trial Chamber may limit the number of spectators in, exclude specific persons from, or restrict access to the courtroom.

[Note. Questions arising under this rule include whether the Trial Chamber should have the power to order a closed hearing and whether photography, video recording or audio recording of the trial, other than by the Registry under rule 98, should be permitted.]

Rule 91

Closed sessions

(A) As provided for in article X (A 38 (4) ILC) of the Statute, the Trial Chamber may order that the press and the public be excluded from all or part of the proceedings for reasons of:

(i) public order or morality;

(ii) safety, security or non-disclosure of the identity of a victim or witness as provided in rule 95;

(iii) the protection of the interests of justice.

(B) The Trial Chamber shall make public the reasons for its order.

[Note. This rule is wider in some respects than article 38 (4) of the ILC draft statute.]

ARGENTINA

Rule 91

(C) The trial shall be carried out in open sessions as soon as the reasons why the proceedings were being carried out in closed sessions have ceased to exist.

FRANCE

Article 104

Public nature of trial

1. The trial, with the exception of the consideration of findings, shall be public.

2. Nevertheless, the Trial Chamber may, of its own motion or at the request of the Prosecutor, the accused, a victim or a witness, order, by a decision given in public, that the entire trial or a part thereof be held in camera:

(a) for reasons connected with protection of public order or of human dignity;

(b) to ensure the safety and protection of the accused, of the victims or of witnesses.

3. Proceedings shall be held in camera as of right:

(a) at the request of the accused if he was a minor at the time of commission of the acts;

(b) at the request of a witness or a victim who suffered sexual violence.

When in camera proceedings have been ordered, the judgement on the merits shall always be pronounced in public hearing.

JAPAN

1. The accused shall enjoy the right to a speedy and public trial by an impartial tribunal.

2. Trials shall be conducted and judgement declared publicly. Where the Court unanimously determines publicity to be dangerous to public order, a trial may be conducted privately.

F. Powers of the Trial Chamber/Preliminary motions

I. ILC DRAFT

5. The Chamber shall, subject to this Statute and the rules, have, *inter alia*, the power on the application of a party or of its own motion to:

(a) issue a warrant for the arrest and transfer of an accused who is not already in the custody of the Court;

(b) require the attendance and testimony of witnesses;

(c) require the production of documentary and other evidentiary materials;

(d) rule on the admissibility or relevance of evidence;

(e) protect confidential information; and

(f) maintain order in the course of a hearing.

II. PROPOSALS

AUSTRALIA AND NETHERLANDS

Rule 79

Preliminary motions by accused

(A) Preliminary motions open to the accused shall include:

(i) objections based on lack of jurisdiction;

(ii) objections based on defects in the form of the indictment;

(iii) applications for the exclusion of evidence obtained from the accused or having belonged to him or her;

(iv) applications for severance under rule 64;

(v) objections based on the denial of request for assignment of counsel.

(B) Any of the motions by the accused referred to in subrule (A) shall be brought within sixty days after his or her initial appearance, and in any case before the hearing on the merits.

(C) Failure to apply within the time limit prescribed shall constitute a waiver of the right. Upon a showing of good cause, the Trial Chamber may grant relief from the waiver.

[*Note*. Subrules (B) and (C) conflict with article 34 of the ILC draft statute.]

Rule 80

Opportunity to respond

Upon the submission of a motion, the other party shall be afforded a reasonable opportunity to respond to it. The supplementary rules may set time limits for responses.

Rule 81

Ruling on motions

Motions shall be decided as expeditiously as possible. A motion may be summarily denied on the grounds that insufficient allegations of fact or law have been set forth to justify further inquiry by the Trial Chamber.

Rule 94

Instruments of restraint

Instruments of restraint, such as handcuffs, shall not be used except as a precaution against escape during transfer or for security reasons, and shall be removed when the accused appears before a Trial Chamber.

Rule 116

Power of Trial Chambers to order production of additional evidence

A Trial Chamber may order either party to produce additional evidence. It may itself summon witnesses and order their attendance.

FRANCE

Article 99

Pre-trial detention and judicial supervision

The Trial Chamber, upon being seized of a case, must decide whether the accused is to be placed under judicial supervision or in pre-trial detention, in accordance with the rules and modalities laid down in articles 52 to 56.

Appeals against decisions of the Trial Chamber concerning court supervision or pre-trial detention shall be submitted to the Appeals Chamber.

Article 100

Warrants issued by the Trial Chamber

Warrants issued by the Trial Chamber shall remain effective during the trial unless the Trial Chamber decides to terminate or modify them, of its own motion, on application by the prosecutor or the accused, or upon expiry of the four-month period referred to in article 56, paragraph 1.

Article 105

Determination of proof

The commission of a crime may be established by any method of proof and the Trial Chamber shall decide in accordance with its innermost conviction.

It may base its decision only on evidence submitted to it during the deliberations and discussed before it on an adversary basis.

The accused must have the benefit of the doubt.

Article 118

Request for judicial assistance

The provisions of Part 4, Title III, subtitle 2, of this Statute shall apply before the Trial Chamber.

The request for judicial assistance shall be made by the President of the Chamber. The President of the Chamber or a judge appointed by him may assist in the execution of the request for judicial assistance on the territory of the State to which the request is made.

Article 117

Decision to postpone

The Trial Chamber may, either of its own motion or at the request of the prosecutor or the accused, order postponement of the case to a later date in the interest of proper administration of justice and respect for the rights of the defence.

The parties shall be called upon to submit their observations. The decision shall be taken without prejudice to implementation of the provisions of article 99. It shall not be subject to appeal.

Article 120

Powers of the President

The President shall control the hearing and direct the deliberations. He shall reject anything which might compromise their dignity or prolong them without giving reason to hope for greater certainty in their results.

He shall have a duty to remain impartial in all circumstances.

He shall determine the order of the examination of the accused, the hearing of experts and the depositions of witnesses.

The accused, the witnesses, the experts and any person called to the bar shall be examined first of all by the President. Following this, the Prosecutor and the defence counsel of the accused may also examine them with the authorization of the President.

Article 121

Powers of the Chamber

1. The Trial Chamber may of its own motion call witnesses or experts to appear or have placed before it any new evidence which it deems useful for ascertainment of the truth.

2. The Prosecutor or the accused may request the appearance of a witness or of an expert who was not summoned to appear in accordance with article 118. The Chamber may deny such an appearance only if it can show that, for stated reasons, the appearance is not possible or if it will not contribute to ascertainment of the truth. The decision of the Chamber shall not be subject to appeal.

SINGAPORE

1. Subparagraph (b) to be amended to read:

   "(b) require the attendance and testimony of witnesses who appear before the Court;"

2. Subparagraph (c) to be amended to read:

   "(c) require the production of documentary and other evidential materials from witnesses who appear before the Court;"

3. Insert a new subparagraph (c) *bis* as follows:

   "(ca) request the assistance of States in the taking of testimony from witnesses and the production of documentary and other evidence;"

G. Amicus curiae

AUSTRALIA AND NETHERLANDS

Rule 96

Amicus curiae

A Trial Chamber may, if it considers it desirable for the proper determination of the case, invite or grant leave to a State, organization or person to appear before it and make submissions on any issue specified by the Chamber.

H. Records of proceedings

I. ILC DRAFT

6. The Chamber shall ensure that a complete record of the trial, which accurately reflects the proceedings, is maintained and preserved by the Registrar.

II. PROPOSALS

AUSTRALIA AND NETHERLANDS

Rule 97

Solemn undertaking by interpreters and translators

Before performing any duties, an interpreter or a translator shall solemnly undertake to do so faithfully, independently, impartially and with respect for the duty of confidentiality.

Rule 98

Records of proceedings and evidence

(A) The Registrar shall cause to be made and preserve a full and accurate record of all proceedings, including audio recordings, transcripts and, when deemed necessary by the Trial Chamber, video recordings.

FRANCE

Article 119

Recording of deliberations and preservation of evidence

1. The Registrar shall prepare and keep a complete record of all the deliberations, including a sound recording, the transcription thereof and, where deemed necessary by the Trial Chamber, an audiovisual record. The latter shall be made from fixed points.

2. The Trial Chamber may, with the consent of a person who had requested that the case be heard in camera, order the disclosure of all or part of the record of the deliberations in camera, if the reasons justifying proceedings in camera no longer exist.

3. The Registrar shall ensure the preservation and custody of all material evidence produced in the course of the proceedings.

4. The Trial Chamber shall determine whether photographs, video recordings or sound recordings may be taken during the hearing other than by the Registrar.

5. All sound or audiovisual recordings made during the deliberations may be used in the event of appeal or revision.

6. Once the trial has concluded with a judgement that has become final, reproduction or full or partial broadcasting of these recordings, in such manner as is laid down in the rules of procedure, may be authorized by the President of the Court.

I. Trial procedures

AUSTRALIA AND NETHERLANDS

Rule 99

Opening statements

Before presentation of evidence by the Prosecutor, each party may make an opening statement. The defence may however elect to make its statement after the Prosecutor has concluded his presentation of evidence and before the presentation of evidence for the defence.

Rule 100

Presentation of evidence

(A) Each party is entitled to call witnesses and present evidence. Unless otherwise directed by the Trial Chamber in the interests of justice, evidence at the trial shall be presented in the following sequence:

(i) evidence for the prosecution;

(ii) evidence for the defence;

(iii) prosecution evidence in rebuttal;

(iv) defence evidence in rejoinder;

(v) evidence ordered by the Trial Chamber pursuant to rule 116.

(B) Examination-in-chief, cross-examination and re-examination shall be allowed in each case. It shall be for the party calling a witness to examine him or her in chief, but a judge may at any stage put any question to the witness.

(C) The accused may, if he or she so desires, appear as a witness in his or her own defence.

Rule 101

Postponements

The Trial Chamber shall have the power to order a postponement of proceedings, proprio motu or on the application of either party, on the following grounds:

[Grounds to be listed]

Rule 102

Closing arguments

After the presentation of all the evidence, the Prosecutor may present an initial argument, to which the defence may reply. The Prosecutor may, if he or she wishes, present a rebuttal argument, to which the defence may present a rejoinder.

Article 39

Principle of legality (nullum crimen sine lege) 56/

ILC DRAFT

An accused shall not be held guilty:

(a) in the case of a prosecution with respect to a crime referred to in article 20 (a) to (d), unless the act or omission in question constituted a crime under international law;

(b) in the case of a prosecution with respect to a crime referred to in article 20 (e), unless the treaty in question was applicable to the conduct of the accused;

at the time the act or omission occurred.

56/ This article was not considered by the informal working group on procedural questions, fair trial and regrets of the accused, as it deals with other matters.

Article 40*

Presumption of innocence

I. ILC DRAFT

An accused shall be presumed innocent until proved guilty in accordance with law. The onus is on the Prosecutor to establish the guilt of the accused beyond reasonable doubt.

II. PROPOSALS

Anyone

[accused]

[charged with a criminal offence]

[suspected of committing a crime within the meaning of this statute]

shall be presumed innocent until proved guilty [in accordance with law].

[The onus is on the Prosecutor to establish the guilt of the accused]

[The accused is declared guilty only when the majority of the Trial Chamber considers that the guilt of the accused has been proved] beyond a reasonable doubt.

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* Article 40 is also dealt with in the report of the informal group on general principles of criminal law (see Part 3 bis above).

Article 41

Rights of the accused

I. ILC DRAFT

1. In the determination of any charge under this Statute, the accused is entitled to a fair and public hearing, subject to article 43, and to the following minimum guarantees:

(a) to be informed promptly and in detail, in a language which the accused understands, of the nature and cause of the charge;

(b) to have adequate time and facilities for the preparation of the defence, and to communicate with counsel of the accused's choosing;

(c) to be tried without undue delay;

(d) subject to article 37 (2), to be present at the trial, to conduct the defence in person or through legal assistance of the accused's choosing, to be informed, if the accused does not have legal assistance, of this right and to have legal assistance assigned by the Court, without payment if the accused lacks sufficient means to pay for such assistance;

(e) to examine, or have examined, the prosecution witnesses and to obtain the attendance and examination of witnesses for the defence under the same conditions as witnesses for the prosecution;

(f) if any of the proceedings of or documents presented to the Court are not in a language the accused understands and speaks, to have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness;

(g) not to be compelled to testify or to confess guilt.

2. Exculpatory evidence that becomes available to the Procuracy prior to the conclusion of the trial shall be made available to the defence. In case of doubt as to the application of this paragraph or as to the admissibility of the evidence, the Trial Chamber shall decide.

II. PROPOSALS

The accused shall be entitled to the following minimum guarantees:

A. Public hearing

1. In the determination of any charge under this Statute, the accused, [in addition to the rights afforded to suspects under article [?]] is entitled to a fair and public hearing [by an independent and impartial tribunal]. The right to a public hearing is subject to the following exceptions:

(a) the deliberations of the Court shall be private;

(b) the Trial Chamber may, of its own motion or at the request of the prosecutor, the accused, a victim or a witness, order, by a decision given in public, that the entire trial or a part thereof be held in camera:

(i) for reasons connected with protection of public order or of human dignity;

(ii) to ensure the safety and protection of the accused, of the victims or of witnesses;

(c) proceedings shall be held in camera as of right:

(i) at the request of the accused if he was a minor at the time of the commission of the acts;

(ii) at the request of a witness or a victim who suffered sexual violence;

(d) when in camera proceedings have been ordered, the judgement on the merits shall always be pronounced in a public hearing.

B. Notification of charge [57]

1. The accused [Any one suspected of committing a crime within the meaning of this Statute] is entitled to be informed promptly [and in detail], in a language which the accused understands, of the [nature and cause of the] charge against him/her [and, to this end, to have the free assistance of a competent interpreter, and to be provided free of charge with a translation of the documents on the basis of which the [accused/suspect] is being questioned or that show why a measure infringing upon the [accused/suspect]'s liberty or property has been proposed].

[2. Anyone suspected of committing a crime within the meaning of this Statute must before being questioned, or when a measure infringing upon his liberty or property has been proposed and brought to his attention, be fully informed of the charges against him and the rights to which he is entitled as a suspect under paragraph [?] of article [?]].

C. Preparation of defence

1. The accused is entitled to have adequate time and facilities for the preparation of the defence, and to communicate with counsel of the accused's choosing.

2. All communications between lawyer and client shall be regarded as privileged, and consequently not subject to disclosure at trial, unless:

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[57] Articles 26 and 30 of this compilation also currently contain provisions related to the right of suspects or accused to be notified of the charges. Delegations should consider where in the Statute or rules such rights would be most appropriately located.

(i) the client consents to such disclosure; or

(ii) the client has voluntarily disclosed the content of the communication to a third party, and that third party then gives evidence of that disclosure.

D. Speedy trial

1. The accused shall enjoy the right to [be tried without undue delay] [a speedy and public trial by an impartial tribunal].

E. Right to counsel

1. Subject to article 37 (2), the accused is entitled to be present at the trial and

> [to conduct the defence in person or through legal assistance of the accused's choosing]
>
> [at all times, shall have the [prompt] assistance of competent counsel] [of the accused's choosing]

and to be informed, if the accused does not have legal assistance, of this right and to have legal assistance assigned by the [Court] [Preliminary Investigations Chamber of the Court], without payment if the accused [lacks sufficient means to pay for such assistance] [is unable to secure the same by his/her own efforts].

2. Matters concerning the qualification of counsel, including counsel assigned by the Court shall be [provided in the rules of the Court] [determined as follows:

(a) counsel engaged by a suspect or an accused shall file his or her power of attorney with the Registrar at the earliest opportunity;

(b) a counsel shall be considered qualified to represent a suspect or accused if he or she satisfies the Registrar that he or she is admitted to the practice of law in a State;

(c) a person who has witnessed the crime for which the accused has been indicted may not act as counsel for the defence. A person may not act as counsel for the defence or shall be immediately dismissed from such office if it is proved or deemed very probable according to objective facts that:

(i) he or she has participated or is participating in any of the crimes being investigated in the proceedings;

(ii) he or she is a participant in the crime of aiding in the commission of those crimes, or of harbouring a suspect, or destroying or concealing evidence in connection with such crimes;

(iii) he or she is participating together with the accused in an illicit association or any other kind of illegal organization related to the crime that is being investigated in the proceedings;

(iv) he or she has participated or is participating in an attempt to escape by the accused.]

3. Matters concerning the assignment of counsel shall be [provided in the rules] [determined as follows:

(a) a list of counsel who speak one or both of the working languages of the Court, meet the requirements of paragraph [2] and have indicated their willingness to be assigned by the Court to indigent suspects or accused, shall be kept by the Registrar;

(b) the criteria for determination of indigency shall be established by the Registrar and approved by the judges;

(c) in assigning counsel to an indigent suspect or accused, the following procedure shall be observed:

(i) a request for assignment of counsel shall be made to the Registrar;

(ii) the Registrar shall inquire into the means of the suspect or accused and determine whether the criteria of indigency are met;

(iii) if he or she decides that the criteria are met, he or she shall assign counsel from the list; if he or she decides to the contrary, he or she shall inform the suspect or accused that the request is refused;

(d) the suspect or accused may seek from the Presidency a review of a decision to refuse a request; the decision of the Presidency shall be final; the procedure governing review by the Presidency shall be laid down in the supplementary rules;

(e) if a request is refused, a further request may be made by a suspect or an accused to the Registrar upon showing a change in circumstances;

(f) the Registrar shall, in consultation with the judges, establish the criteria for the payment of fees to assigned counsel;

(g) [if the suspect or an accused is not indigent, but does not wish to retain defence counsel, the Court shall nevertheless assign defence counsel from the list kept by the Registrar, and shall then seek to recover the cost of providing defence counsel according to the procedure laid down in subrule (h)];

[If a suspect or an accused person elects to conduct his or her own defence, he or she shall so notify the Registrar in writing at the first opportunity. However, if the Trial or Appeals Chamber considers that the technical defence is thereby impaired, it shall automatically order the assignment of defence counsel from the list kept by the Registrar];

(h) where an alleged indigent person is subsequently found not to be indigent, the Trial or Appeals Chamber may make an order of contribution to recover the cost of providing counsel for proceedings before that Chamber;

(i) no defence counsel may represent more than one indicted person or accused in the same trial;

(j) if the defence counsel of a suspect or accused resigns the defence or abandons it during the proceedings, the Trial or Appeals Chamber shall give the suspect or the accused a specific time period in which to retain other defence counsel. If, at the end of that time, the suspect or the accused has not retained counsel or stated his or her intention to defend him or herself in person, defence counsel shall be assigned automatically from the list kept by the Registrar. Subrules (g) and (h) will still apply.]

F. Examination of witnesses

1. The accused shall be entitled to examine or have examined [the prosecution witnesses] [witnesses against him/her] and to obtain the attendance and examination of witnesses [for the defence] [on his behalf] under the same conditions as witnesses [for the prosecution] [against him/her]. [In addition the accused shall also be entitled to present any other evidence.]

2. The accused may, if he or she so desires, [make an unsworn statement in his or her defence] appear as a witness in his or her own defence.

G. Interpretation and translation

1. Anyone suspected of committing a crime within the meaning of this Statute shall be entitled to be informed of the charges against him and questioned in a language which he understands and to this end, to have, free of any cost, the assistance of a competent interpreter and to be provided free of charge with a translation of the documents on the basis of which he is being questioned or that show why a measure infringing upon his liberty or property has been proposed.

2. If any of the proceedings of or documents presented to the Court are not in a language the accused understands and speaks, the accused is entitled to have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness.

[3. The working languages of the Court shall be English and French.]

[4. Any other person appearing before the Court, other than as counsel, who does not have sufficient knowledge of either of the two working languages may use his or her own language and have the benefit of interpretation and translation on the basis of the same criteria applied to an accused under this article.] 58/

[5. Counsel for an accused may apply to the Presiding Judge of a Chamber for leave to use a language other than the two working ones or the language of the accused. If such leave is granted, the expenses of interpretation and translation shall be borne by the Court to the extent, if any, determined by the President, taking into account the rights of the defence and interests of justice.]

58/ Paragraphs 3 to 7 could more appropriately to be added to article 18, concerning working languages, rather than be addressed in article 41, concerning the rights of the accused.

[6. Documents filed with the Court shall be in one of the working languages or accompanied by a translation into one of those languages.]

[7. The Registrar shall make any necessary arrangements for interpretation and translation into and from the working languages.]

H. Self-incrimination

1. The accused [anyone suspected of committing a crime within the meaning of this Statute] shall be entitled not to be compelled to testify [against himself/herself] or to confess guilt.

2. Anyone suspected of committing a crime within the meaning of this Statute shall be entitled to remain silent without such silence being taken into consideration by the Court at a later stage in the determination of his guilt or innocence.

3. No person shall be subject to torture or to cruel, inhuman or degrading treatment.

I. Disclosure of evidence

1. [Inculpatory evidence and] exculpatory evidence [evidence which in any way tends to suggest the innocence or mitigate the guilt of the accused or may affect the credibility of prosecution evidence]

[that becomes available]

[the existence of which is known]

to the [Procuracy] [Prosecutor] prior to the conclusion of the trial shall be made available [disclosed] to the defence [as soon as practicable].

2. The duty to disclose is ongoing and if the Prosecutor discovers additional evidence or material which should have been produced earlier [pursuant to the rules] he shall promptly notify the other party and the Trial Chamber of the existence of the additional evidence or material.

3. The Prosecutor may request an ex parte hearing in camera before the Trial Chamber for the purpose of obtaining a ruling on whether or not particular evidence falls within the category of exculpatory evidence. In case of doubt as to the application of this [paragraph] or as to the admissibility of the evidence, the Trial Chamber shall decide.

4. The accused shall be entitled to have communicated to him or her all evidence submitted to the Court.

J. Search and seizure

The right of all persons to be secure in their homes, papers and effects against entries, searches and seizures shall not be impaired except upon warrant issued, in accordance with the rules of the Court, for adequate cause and particularly describing the place to be searched and things to be seized, or except on such grounds and in accordance with such procedures as are established by the rules of the Court.

K. Due process

1. No person shall be deprived of life or liberty, nor shall any other criminal penalty be imposed, without due process of law.

2. No person shall be found guilty unless the [Prosecutor proves beyond a reasonable doubt] [Court is convinced] that the accused has committed every element of the offence with which he/she is charged. 59/

59/ This issue is also addressed above in Part 3 bis on general principles of criminal law.

Article 42

Non bis in idem

I. ILC DRAFT

1. No person shall be tried before any other court for acts constituting a crime of the kind referred to in article 20 for which that person has already been tried by the Court.

2. A person who has been tried by another court for acts constituting a crime of the kind referred to in article 20 may be tried under this Statute only if:

(a) the acts in question were characterized by that court as an ordinary crime and not as a crime which is within the jurisdiction of the Court; or

(b) the proceedings in the other court were not impartial or independent or were designed to shield the accused from international criminal responsibility or the case was not diligently prosecuted.

3. In considering the penalty to be imposed on a person convicted under this Statute, the Court shall take into account the extent to which a penalty imposed by another court on the same person for the same act has already been served.

II. PROPOSALS

1. [No person shall be tried before any other court for acts constituting a crime referred to in article 20 for which that person already has been tried by the Court.] [Once convicted or acquitted by a final judgement of the Court] for acts constituting a crime of the kind referred to in article 20 a person may no longer be accused on the basis of the same evidence, even for a different offence, either by the organs of the Court or by the judicial authorities of the States Parties, unless new evidence is made known [in which case the Prosecutor of the Court may institute new proceedings].

2. [No person shall be tried before any other court for acts constituting a crime referred to in article 20 for which that person already has been tried by the Court.] A person who has been tried by another court for acts constituting a crime of the kind referred to in article 20 may be tried under this Statute only if:

(a) the acts in question were characterized by that court as an ordinary crime and not as a crime which is within the jurisdiction of the Court; or

(b) the proceedings in the other court were not impartial or independent or were designed to shield the accused from international criminal responsibility or the case was not diligently prosecuted.

[2 bis. The court has no jurisdiction under this Statute when:

(a) The acts mentioned in the submission to the Court are still being investigated by a State and the investigation is not manifestly intended to relieve the person concerned of criminal responsibility;

(b) The acts mentioned in the submission to the Court have already been duly investigated by a State and the decision not to institute proceedings was taken by that State when it had knowledge of all the facts mentioned in the submission and the decision was not motivated by a manifest willingness to relieve the persons concerned of any criminal responsibility;

(c) Any person(s) mentioned in the submission to the Court have already been acquitted or convicted by a final ruling in a State for the acts involved unless the decision failed to take account of all facts contained in the submission or the proceedings were conducted in the State concerned by evading the rule of international law for the manifest purpose of relieving the persons concerned of criminal responsibility.

3. In considering the penalty to be imposed on a person convicted under this Statute, the Court shall take into account the extent to which a penalty imposed by another court on the same person for the same act has already been served.

Article 43

Protection of the accused, victims and witnesses

I. ILC DRAFT

The Court shall take necessary measures available to it to protect the accused, victims and witnesses and may to that end conduct closed proceedings or allow the presentation of evidence by electronic or other special means.

II. PROPOSALS

A. Victims and Witnesses Services Unit (Rights of the victims)

[(a) The Court shall ensure the safety of the accused, victims and witnesses, as well as that of their families, from intimidation and retaliation before, during and after the trial. To this end a special service shall be established to achieve that purpose and States Parties should cooperate with this service in their respective territories. In particular this service, as well as States Parties, shall take additional measures to protect the integrity, privacy and physical and psychological well-being of victims of sexual assault and of children who are victims or witnesses.";

(b) Legal representatives of victims of crimes have the right to participate in the proceedings with a view to presenting additional evidence needed to establish the basis of criminal responsibility as a foundation for their right to pursue civil compensation;

(c) The judgement of the Court shall also include a determination of the scope and extent of the victimization in order to allow victims to rely on that judgement for the pursuit of civil remedies, including compensation, either in national courts or through their Governments, in accordance with international law;

(d) The rules of procedure shall include provisions giving effect to the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power adopted by the General Assembly in its resolution 40/34 of 29 November 1985, which was recalled by the Economic and Social Council in its resolution 1996/14 of 23 July 1996 in paragraph 6 of which the Council "requests the Secretary-General to bring to the attention of the Preparatory Committee for the Establishment of an International Criminal Court the potential applicability of the basic principles, contained in the Declaration", and the Principles Guaranteeing the Rights and Interests of Victims in the Proceeding of the Proposed International Criminal Court adopted by the Commission on Crime Prevention and Criminal Justice.]

* * *

Victims and Witnesses Unit

[(A) There shall be set up under the authority of the Registrar a Victims and Witnesses Unit consisting of qualified staff to:

(i) recommend protective measures for victims and witnesses in accordance with article X (A 43 ILC) of the Statute;

(ii) provide counselling and support for them, in particular in cases of rape and sexual assault.

(B) Due consideration shall be given, in the appointment of staff, to the employment of qualified women.]

B. Measures for protection

[As provided for in article X (A 38 (4), 43 ILC) of the Statute a] [the] Trial Chamber may [proprio motu or] at the request of [either party] [the Prosecutor, the accused [or of] the victim or the witness concerned [or of the Victims and Witnesses Unit] order appropriate measures to protect the privacy and security protection of victims and witnesses, provided the said measures are [consistent with] [not prejudicial to] the rights of the accused [as provided for in the Statute and the rules, in particular the right to examine, or have examined, prosecution witnesses]. [The States Parties are required, where necessary, to execute these measures, subject to observance of their internal law].

The [a] Trial Chamber may hold a hearing [proceeding] in camera [to determine] [for the purpose of determining, without prejudice to the rights of the accused] [whether to order] [the necessity of ordering]:

(a) measures to prevent disclosure to the public or the [information] media of the identity [or whereabouts] of a victim or a witness, of persons related to them or associated with them, [or of their locality], by such means as:

(i) [deletion from the court records of the name of the person concerned and of particulars by means of which he might be identified] [expunging names and identifying information from the Chamber's public records];

(ii) [prohibition of access by the public to any evidence in the file by means of which the victim might be identified] [non-disclosure to the public of any records identifying the victim];

(iii) [the use during testimony of [image or voice altering devices] [of technical methods for altering appearances or voices] or [the use of] closed circuit television];

(iv) [assignment of a pseudonym]; 60/

(b) [closed sessions, in accordance with rule 91] [the holding of hearings in camera, in accordance with article 38];

(c) appropriate measures to facilitate testimony [of vulnerable victims and] [by a victim or by a vulnerable] witness[es], [such as] [by means of] [one-way] closed circuit television.

60/ Concerns were raised regarding the restriction of the right of the accused to cross-examine and contradict witnesses that the measures provided for in sections (iii) and (iv) may lead to.

[A Trial Chamber shall, whenever necessary, control the manner of questioning to avoid any harassment or intimidation.]

* * *

Rule 86

Protection of victims and witnesses

[(A) In exceptional circumstances, the Prosecutor may apply to a Trial Chamber to order the non-disclosure of the identity of a victim or witness who may be in danger or at risk until such person is brought under the protection of the Tribunal.

(B) In the determination of protective measures for victims and witnesses, the Trial Chamber may consult the Victims and Witnesses Unit.

(C) Subject to rule 95, the identity of the victim or witness shall be disclosed in sufficient time prior to the trial to allow adequate time for preparation of the defence.]

[Note. The protection of victims and witnesses will be an important responsibility of the Court. The non-disclosure of the identity of victims and witnesses needs to be balanced against the right of an accused to prepare his or her defence.]

C. Compensation to the accused

1. The Court shall make compensation to those who were:

(a) Pronounced innocent by an irrevocable adjudication;

(b) Arrested or detained for the purpose of prosecution, although the prosecution against him did not eventually take place;

(c) Arrested or detained but the lawfulness of that arrest or detention was denied in accordance with this Statute; or

(d) Illegally inflicted losses upon by an officer of the Court intentionally or negligently in the course of performing its duties.

2. Procedures and criteria for compensation shall be provided in the rules including the expenses to be borne by a complainant State if that State lodged a complaint without sufficient reason.

* * *

The Appeals Chamber may grant compensation to a person who was held in pre-trial detention during proceedings against him that have concluded with a final decision of acquittal. The compensation shall be based on the prejudice caused to him by such detention.

If the Preliminary Investigations Chamber decides to release the person concerned because his arrest or detention was unlawful, it may award him compensation.

Article 44

Evidence

I. ILC DRAFT

1. Before testifying, each witness shall, in accordance with the Rules, give an undertaking as to the truthfulness of the evidence to be given by that witness.

2. States parties shall extend their laws of perjury to cover evidence given under this Statute by their nationals, and shall cooperate with the Court in investigating and where appropriate prosecuting any case of suspected perjury.

3. The Court may require to be informed of the nature of any evidence before it is offered so that it may rule on its relevance or admissibility.

4. The Court shall not require proof of facts of common knowledge but may take judicial notice of them.

5. Evidence obtained by means of a serious violation of this Statute or of other rules of international law shall not be admissible.

II. PROPOSALS

A. Determination of proof

GERMANY

In order to determine the truth, the court shall, ex officio, extend the taking of evidence to all facts and evidence that are important for the decision. The court will decide on the taking of evidence according to its [free] conviction obtained from the entire trial.

FRANCE

Article 105

Determination of proof

The commission of a crime may be established by any method of proof and the Trial Chamber shall decide in accordance with its innermost conviction.

It may base its decision only on evidence submitted to it during the deliberations and discussed before it on an adversary basis.

The accused must have the benefit of the doubt.

NETHERLANDS

Article 44a

Evidentiary sources. Rule of legal reasoning and exclusionary rule

1. The Trial Chamber shall rely [for the determination of guilt] only on the following means of evidence, presented or realized on trial in open court:

(a) the confession or admission of the accused;

(b) the testimony of witnesses and experts;

(c) documents drafted in their legal form in accordance with the legal procedures either of the administering State or of the Court;

(d) the judicial observations.

2. No judgement containing a determination of guilt shall be based only on the confession of the accused nor can any judgement be based on one testimony alone.

3. Decisions of evidentiary nature shall be based on reasons explicitly stated in the judgement.

Article 44b

Evidence obtained by national authorities

1. The Court has, in case of evidence obtained by national authorities, to presume irrebuttably that the national authorities acted in accordance with the domestic provisions.

2. In case of a plea on behalf of the accused to the contrary of this presumption, the Court may refer the accused in that respect to the national procedures of the administering State to decide on that plea. The Court may decide to a discontinuation of procedure during that referral until an irrevocable decision of the administering State has been received [by the Registrar].

3. In case the Court rejected a motion on behalf of the accused for application for referral in accordance with paragraph 2 or for discontinuation of procedure, the accused shall have the right of appeal on the ground of non-compliance with the rules of evidence.

4. In case the Court decided to a referral or discontinuation of procedure in accordance with paragraph 2, the Prosecutor shall have the right of appeal on the ground mentioned in paragraph 3.

B. Undertaking as to truthfulness

[See paragraph 1 of the ILC draft.]

AUSTRALIA AND NETHERLANDS

Rule 106

Testimony of witnesses

(A) Witnesses shall, in principle, be heard directly by the Chambers unless a Chamber has ordered that the witness be heard by means of a deposition [see note on section 5 of Part IX].

(B) Every witness shall, before giving evidence, make the following solemn declaration: "I solemnly declare that I will speak the truth, the whole truth and nothing but the truth."

(C) A child who, in the opinion of the Chamber, does not understand the nature of a solemn declaration, may be permitted to testify without that formality, if the Chamber is of the opinion that he or she is sufficiently mature to be able to report the facts of which he or she had knowledge and that he or she understands the duty to tell the truth. A judgement, however, cannot be based on such testimony alone.

(D) A witness, other than an expert, who has not yet testified shall not be present when the testimony of another witness is given. However, a witness who has heard the testimony of another witness shall not for that reason alone be disqualified from testifying.

(E) A witness may object to making any statement which might tend to incriminate him or her. The Chamber may, however, compel the witness to answer the question. Testimony compelled in this way shall not be used as evidence in a subsequent prosecution against the witness for any offence other than perjury. 61/

FRANCE

Article 122

Testimony

...

3. Each witness shall, at the request of the President, state his name, forenames, age, occupation and domicile or place of residence. The President may dispense a witness from the requirement to reveal his identity, his occupation or his domicile or place of residence. Before commencing their testimony, the witnesses shall declare on oath that they will speak without hatred and without fear and that they will speak the truth and only the truth.

61/ There is a need to list fully the grounds on which a witness could refuse to give evidence, for example, where a witness is the spouse of an accused.

C. Perjury: punishable by national courts v. the Court

[See paragraph 2 of the ILC draft.]

AUSTRALIA AND THE NETHERLANDS

SECTION 3. CONTEMPT OF COURT, MISCONDUCT AND PERJURY

[As is the case with national courts, the Court must have the power to deal with contempt and perjury. The Statute should address the point with necessary elaboration to be undertaken in the rules. Following for information is rule 77 of the Rules of the Tribunal for the former Yugoslavia dealing with contempt:

Rule 77

Contempt of the Tribunal

(A) Subject to the provisions of subrule 90(E), a witness who refuses or fails contumaciously to answer a question relevant to the issue before a Chamber may be found in contempt of the Tribunal. The Chamber may impose a fine not exceeding US$ 10,000 or a term of imprisonment not exceeding six months.

(B) The Chamber may, however, relieve the witness of the duty to answer, for reasons which it deems appropriate.

(C) Any person who attempts to interfere with or intimidate a witness may be found guilty of contempt and sentenced in accordance with subrule (A).

(D) Any judgement rendered under this rule shall be subject to appeal.

(E) Payment of a fine shall be made to the Registrar to be held in a separate account.]

[The Court will also need the power to deal with the misconduct of counsel. Following for information is rule 46 of the Rules of the Tribunal for the former Yugoslavia dealing with this matter:

Rule 46

Misconduct of Counsel

(A) A Chamber may, after a warning, refuse audience to counsel if, in its opinion, his conduct is offensive, abusive or otherwise obstructs the proper conduct of the proceedings.

(B) A judge or a Chamber may also, with the approval of the President, communicate any misconduct of counsel to the professional body regulating the conduct of counsel in his State of admission or, if a professor and not otherwise admitted to the profession, to the governing body of his University.]

[The Court must also be able to deal with perjury. Article 44(2) of the ILC draft Statute currently provides for the States parties to extend their laws of perjury to cover evidence given by their nationals. This provision has been criticized and it has been proposed that the Statute deal with the issue of perjury. One of the shortcomings of article 44(2) is that it would not cover the situation where the national of a non-State party was giving evidence. Following for information is rule 91 of the Rules of the Tribunal for the former Yugoslavia:

Rule 91

False testimony under Solemn Declaration

(A) A Chamber, on its own initiative or at the request of a party, may warn a witness of the duty to tell the truth and the consequences that may result from a failure to do so.

(B) If a Chamber has strong grounds for believing that a witness has knowingly and wilfully given false testimony, it may direct the Prosecutor to investigate the matter with a view to the preparation and submission of an indictment for false testimony.

(C) The rules of procedure and evidence in Parts Four to Eight shall apply *mutatis mutandis* to proceedings under this Rule.

(D) No judge who sat as a member of the Trial Chamber before which the witness appeared shall sit for the trial of the witness for false testimony.

(E) The maximum penalty for false testimony under solemn declaration shall be a fine of US$ 10,000 or a term of imprisonment of twelve months, or both. The payment of any fine imposed shall be made to the Registrar to be held in the account referred to in subrule 77(E).]

[*Note*. An alternative view on dealing with contempt and perjury is that States should punish their nationals for committing contempt and perjury when appearing as witnesses before the Court.]

FRANCE

Article 124

Perjury

If, following the deliberations, the testimony of a witness appears to be false, the Trial Chamber shall request the Registrar to prepare a record of this testimony, which shall be transmitted promptly to the judicial authorities of the State that may undertake prosecution of the witness. The States parties shall extend the provisions of their legislation that are applicable to perjury to testimony given by their nationals under this Statute.

JAPAN

The detailed regulations of procedure concerning trial and judgement including perjury shall be provided in the rules of the Court.

D. Offences against the integrity of the Court

Article

Perjury

A person who:

(a) has given to an organ of the International Criminal Court [62] an undertaking as to truthfulness [63] regarding testimony, or any written statement made by him or her; and

(b) intentionally and contrary to such undertaking communicates any material matter in that testimony or statement that he or she does not believe to be true;

shall be punished by a maximum of [five] years' imprisonment.

Article

Influencing, impeding or retaliating against officials of the Court [64]

A person who:

(a) directly or indirectly offers anything of value to an official of the International Criminal Court with intent to corruptly influence any official act; or

(b) uses physical force, intimidation, or threats against [an official of the International Criminal Court] [any person] with intent to impede, intimidate, or interfere with an official of the International Criminal Court while performing official duties, or with intent to retaliate against such official on account of the performance of official duties;

shall be punished by a maximum of [ten] years' imprisonment.

Article

Obstructing the functions of the Court

1. A person who:

(a) intentionally uses physical force, intimidation, or threats against another with intent to prevent the attendance or testimony of [any] [such] person or the production of evidence in a proceeding of the International

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[62] There will be a need to define "organ of the International Criminal Court".

[63] ILC article 44 (1) provides for an "undertaking" as to the truthfulness of matters asserted before the Court.

[64] There will be a need to define the term "official of the Court".

Criminal Court, or prevent the communication of material information regarding a crime under this statute, an investigation or proceeding before the Court;

(b) intentionally uses physical force, intimidation, or threats against another with intent to retaliate against [any] [such] person for attendance, testimony, or the production of evidence in a proceeding of the International Criminal Court, or the communication of material information regarding a crime under this Statute or an investigation or proceeding before the Court; or

(c) directly or indirectly offers anything of value to another with intent to prevent the attendance or testimony of [any] [such] person, the production of evidence in a proceeding of the International Criminal Court, or the communication of material information regarding a crime under this statute, an investigation or proceeding before the Court;

shall be punished by a maximum of [10] years' imprisonment.

2. A person who:

destroys, alters or conceals a record or other object with intent to withhold it or impair its integrity in an investigation or proceeding before the International Criminal Court;

shall be punished by a maximum of [ten] years' imprisonment.

Article __

Contempt

The Court shall have the power to punish by fine or [ ] months' imprisonment, at its discretion, such contempt of its authority as:

(a) misbehaviour of any person in its presence or so near thereto as to obstruct the administration of justice; or

(b) misbehaviour of any of its officials in their official transactions.

[Note. The question arises as to whether attempt and other inchoate crimes should be punishable. This issue is related to general principles of criminal law.

There is also an issue of whether actions to influence those involved in official Court matters by trick, harassment, or other methods should also be punishable.

There is also the question of whether the regime for cooperation or enforcement regarding these crimes would be the same as for the core crimes.]

E. Determination of relevance and admissibility

[See paragraph 3 of the ILC draft.]

Rule 105

General provisions

(A) The rules of evidence set forth in this section together with article X (A 44 ILC) of the Statute shall govern the proceedings before the Trial Chambers. The Chambers shall not be bound by national rules of evidence.

(B) In cases not otherwise provided for in this section, a Trial Chamber shall apply rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law.

(C) A Trial Chamber may admit any relevant evidence which it deems to have probative value. Irrelevant evidence shall not be admitted.

(D) A Trial Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial.

(E) A Trial Chamber may request verification of the authenticity of evidence obtained out of court.

(F) The Trial Chamber shall place on the record its reasons for excluding relevant evidence.

Rule 106

Testimony of witnesses

(A) Witnesses shall, in principle, be heard directly by the Chambers unless a Chamber has ordered that the witness be heard by means of a deposition [see note on section 5 of Part IX].

Rule 108

Confessions

(A) A confession or admission by the accused given during questioning by the Prosecutor shall, provided the relevant requirements of the Statute and rules were strictly complied with, be presumed to have been free and voluntary unless the contrary is proved.

(B) A confession or admission by a suspect given during questioning by the Prosecutor shall, provided the relevant requirements of the Statute and rules were strictly complied with, be presumed to have been free and voluntary unless the contrary is proved.

(C) A confession or admission by a suspect given during questioning by national authorities shall, provided the relevant requirements of the Statute and the rules were strictly complied with, be presumed to have been free and voluntary unless the contrary is proved.

(D) A confession is an out-of-court acknowledgement of guilt of any element of an offence of any out-of-court self-incriminating statement made by an individual. An admission is any other statement made by an individual with respect to his or her participation or participation in an offence.

Rule 109

Evidence of consistent pattern of conduct

(A) Evidence of a consistent pattern of conduct relevant to serious violations of international humanitarian law under the Statute may be admissible in the interests of justice.

(B) Acts tending to show such a pattern of conduct shall be disclosed by the Prosecutor to the defence pursuant to rule 82.

Rule 111

Agreements by the parties regarding facts in issue

(A) The parties may make oral or written agreements that a fact in issue should be considered proven without the need for evidence to be produced.

(B) The Trial Chamber may, in the interest of justice, decline to accept an agreement under subrule (A).

Rule 113

Evidence in cases of sexual assault

In cases of sexual assault:

(i) No corroboration of the victim's testimony shall be required;

(ii) Consent shall not be allowed as a defence if the victim

  (a) Has been subjected to or threatened with or has had reason to fear violence, duress, detention or psychological oppression, or

  (b) Reasonably believed that if the victim did not submit, another might be so subjected, threatened or put in fear;

(iii) Before evidence of the victim's consent is admitted, the accused shall satisfy the Trial Chamber in camera that the evidence is relevant and credible;

(iv) Prior sexual conduct of the victim shall not be admitted in evidence.

[Note. Should there be an absolute prohibition on prior sexual conduct of a victim being admitted in evidence?]

Rule 114

Joint trials

In joint trials, evidence which is admissible against only some of the joint or several accused may be considered only against the accused concerned.

ARGENTINA

Rule 89 bis

(A) Whenever it is necessary to carry out a reconnaissance, inspection, reconstruction or a scientific or technical test that, because of its nature and characteristics cannot be reproduced in full at a later stage during the trial, or whenever it is assumed that a witness will not be able to testify during trial because of some unsurmountable obstacle, the Prosecutor shall request the Presidency to appoint a judge to carry out or supervise the act.

(B) The judge shall carry out or supervise the act in question notifying the Prosecutor, the accused and his or her counsel, who shall be authorized to be present and shall have the same right to intervene as during the rest of the trial. If the accused is detained, his or her counsel shall act in the accused's behalf, unless the accused expressly asks to be present in person, provided his place of detention is in the territory where the act is to be carried out.

(C) When the accused is yet unknown or any of the acts described under (A) is extremely urgent, the Prosecutor may request the Presidency orally to appoint a judge, who shall carry out or supervise the act. The notifications provided in (B) shall not be necessary but a counsel for the defence shall be appointed ex officio to control the act or to take part in it.

Rule 113

(It is suggested that paragraph (b) (iv) be omitted.)

FRANCE

Article 114

Defence of nullity and plea of inadmissibility of evidence

The Trial Chamber shall have competence to rule on defences based on nullity of the proceedings prior to the opening of the trial. It shall also have competence to rule on defences based on the inadmissibility of evidence recorded during the investigation of the accused, particularly with respect to its compatibility with the rights of the defence.

These defences, to be admissible, must be raised by the parties at the opening of the trial, prior to the reading of the confirmed indictment.

The Trial Chamber may rule on these defences by a decision separate from the judgement on the merits and such decision may be appealed to the Appeals Chamber in the manner provided for in article 7 of this Statute.

JAPAN

Evidence

1. The accused shall be permitted full opportunity to examine all witnesses, and he/she shall have the right of compulsory process for obtaining witnesses on his/her behalf at public expense.

2. A document, audio recording, or video recording containing a statement of a person other than the accused, which was given before a judge of the court of a State Party, is admissible in evidence when that person is not able to testify before the Court because of death, illness, injury, old age or other good cause.

4. Confession made under compulsion, torture or threat, or after prolonged arrest, provisional arrest or detention, or which is suspected not to have been made voluntarily shall not be admitted in evidence.

5. No person shall be convicted or punished in all cases where the only proof against him/her is his/her own conviction.

6. The right of all persons to be secure in their homes, papers and effects against entries, searches and seizures shall not be impaired except upon warrant issued, in accordance with the rules of the Court, for adequate cause and particularly describing the place to be searched and things to be seized, or except on such grounds and in accordance with such procedure as are established by the rules of the Court.

7. No person shall be found guilty unless the Prosecutor proves beyond a reasonable doubt that the defendant has committed every element of the offence with which he/she is charged.

F. Facts of common knowledge

[See paragraph 4 of the ILC draft.]

AUSTRALIA AND NETHERLANDS

Rule 110

Judicial notice

A Trial Chamber shall not require proof of facts of common knowledge but shall take judicial notice thereof.

G. Exclusion of evidence

[See paragraph 5 of the ILC draft.]

AUSTRALIA AND NETHERLANDS

Rule 112

Evidence obtained by means contrary to internationally protected human rights

No evidence shall be admissible if obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings.

ARGENTINA

Rule 112

No evidence shall be admissible if obtained by methods which cast substantial doubt on its reliability. The tribunal shall not admit evidence obtained in violation to this Statute or the rules subsequently made by the Court or by means which constitute a violation to internationally protected human rights.

NETHERLANDS

Article 44a

Evidentiary sources. Rule of legal reasoning and exclusionary rule

4. No evidence shall be admissible if obtained by methods which cast substantial doubts on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings [international standards of due process].

JAPAN

Evidence obtained by means of a serious violation of this Statute or International Covenant on Civil and Political Rights shall not be admitted in evidence.

H. Privileges

AUSTRALIA AND NETHERLANDS

Rule 115

Lawyer-client privilege

All communications between lawyer and client shall be regarded as privileged, and consequently not subject to disclosure at trial, unless:

(i) the client consents to such disclosure; or

(ii) the client has voluntarily disclosed the content of the communication to a third party, and that third party then gives evidence of that disclosure.

ARGENTINA

Rule 106

...

(F) The spouse of the accused, his or her ascendants, descendants, close relatives by consanguinity or adoption, whoever lives with the accused or is bound to him or her by ties of affection shall be exempted from testifying. They shall be informed of their right to refrain from testifying before giving testimony. They shall have the right to refrain from testifying even when giving testimony or with respect to some questions only.

(G) A person who, with respect to the object of his or her testimony is under the obligation to keep a professional, official or private secret may not be admitted as a witness. Should such witness be summoned before the Court, he or she shall present himself or herself and explain the reason why he or she is under the obligation to keep a secret and to refrain from testifying.

(H) If the Trial Chamber considers that the witness is wrong about invoking his or her right to refrain from testifying or to keep a secret, it shall order him or her to give testimony.

FRANCE

Article 125

Confidentiality of communications between the accused and his defence counsel

1. The accused and his defence counsel may converse to the extent necessary for the organization of the defence, without their conversation being supervised.

2. All communications between an accused and his defence counsel shall be covered by professional secrecy and their disclosure may not be ordered unless:

(a) the accused consents to their disclosure;

(b) the accused has voluntarily disclosed their contents to a third party and this third party refers to them during the trial.

I. Procedure for depositions

FRANCE

Article 122

Testimony

1. In principle, the Trial Chamber shall hear witnesses in person.

However, in exceptional circumstances and in the interest of justice, the Trial Chamber may, of its own motion or at the request of the prosecutor or the accused, order that a deposition be taken for the purposes of the trial in the manner provided in article 118.

2. The witnesses shall testify separately from each other, in the order determined by the President.

4. A minor or a person whose judgement has been impaired and who, in the opinion of the Chamber, does not understand the nature of an oath, may be allowed to testify without this formality if the Chamber considers that they are able to describe acts which came to their knowledge and that they understand the meaning of the duty to speak the truth. However, a judgement may not be based on such testimony alone.

5. A witness, other than an expert, who has not yet given evidence, may not be present during the testimony of another witness. However, if he has heard that other testimony this does not mean that his own testimony is inadmissible.

J. National defence secrets

FRANCE

Article 123

Secrecy on defence grounds

1. Any person heard or examined by the Trial Chamber may invoke restrictions provided for in his national law and designed to prevent the divulgation of confidential information connected with national defence.

2. The Trial Chamber may ask the State of which the persons being heard or examined are nationals whether it confirms their claim to be bound to secrecy.

If the State confirms to the Trial Chamber that an obligation of secrecy exists, the Chamber shall note this fact.

3. The provisions of the preceding paragraphs shall also apply to execution of a request for judicial assistance made under article 72.

ISRAEL

Article 44

In paragraph 2, replace the word "perjury" with the words "false testimony".

In paragraph 3, after the words "relevance or admissibility", add the words "after hearing the parties to the case".

Add a new paragraph 5 *bis* reading:

> "With regard to defences open to the accused under the general principles of criminal law in this statute, the onus of proof shall be on the accused, subject to a preponderance of probability as applicable in civil cases."

Article 45

Quorum and judgement

I. ILC DRAFT

1. At least four members of the Trial Chamber must be present at each stage of the trial.

2. The decisions of the Trial Chamber shall be taken by a majority of the judges. At least three judges must concur in a decision as to conviction or acquittal and as to the sentence to be imposed.

3. If after sufficient time for deliberation a Chamber which has been reduced to four judges is unable to agree on a decision, it may order a new trial.

4. The deliberations of the Court shall be and remain secret.

5. The judgement shall be in writing and shall contain a full and reasoned statement of the findings and conclusions. It shall be the sole judgement issued, and shall be delivered in open court.

II. PROPOSALS

A. Preliminary procedural questions

1. The Preliminary Investigations Chamber shall proceed to consider the indictment and any amendment thereto together with all accompanying evidence.

2. It shall take a decision:

(a) on the admissibility of the case on the basis of the reasons listed in article 35, 65/ if the Court has not yet ruled on this issue;

(b) on the serious nature of the charges against the person or persons named in the indictment with respect to an offence within the Court's jurisdiction.

B. Quorum and presence of judges

1. [At least four] [All] members of the Trial Chamber must be present at each stage of the trial. [The decision shall be taken by the judges who attended throughout the deliberations.]

C. Deliberations/Secrecy of deliberations

1. [When both parties have completed their presentation of the case] [Following submission by the Prosecutor and the pleadings of the accused], the

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65/ The provision in the current ILC text dealing with admissibility of a case.

Presiding Judge shall declare the [hearing closed] [deliberations concluded], and the Trial Chamber shall [withdraw to] deliberate in [private] [camera].

2. The deliberations of the Court shall be and remain [secret] [confidential].

3. The Trial Chamber shall vote separately on each charge contained in the indictment. If two or more accused are tried together under rule ___, 66/ separate findings shall be made as to each accused.

D. Pronouncement of judgement/Majority decision

1. [The decisions of the Trial Chamber shall be taken by a majority of the judges.] [At least three] [All] judges must concur in a decision as to conviction [or acquittal] and [at least three judges must concur] as to the sentence to be imposed.

2. The accused shall be found guilty only if [a majority of] the Trial Chamber considers that his guilt has been proved beyond reasonable doubt.

3. The Trial Chamber shall pronounce its finding separately for each charge in the indictment. If several accused are tried together, the Chamber shall rule separately on the case of each one of them.

4. Where necessary, it shall also establish principles relating to compensation for damage caused to the victims and to restitution of property unlawfully acquired by the persons convicted.

5. The judgement shall be [pronounced] [delivered] [at a public hearing] [in open court] on a date to be notified to the parties and to the counsel and at which [they] [the latter] shall be entitled to be present.

6. If the Trial Chamber finds the accused guilty it shall decide on the sentence by a majority vote.

7. The detailed regulations of procedure concerning judgement shall be provided in the rules of the Court.

E. Mistrial/Failure to reach a verdict

1. [If after sufficient time for deliberation a Chamber which has been reduced to four judges is unable to agree on a decision, it may order a new trial.]

[Note. Some delegations were of the view that in such circumstances, the accused would be entitled to an acquittal.]

F. Judgements/Dissenting opinions

1. The [judgement] [grounds for the judgement] shall be given in writing [as soon as possible] and shall contain:

[a full and reasoned statement of the findings and conclusions]

66/ The provision on joint trials, currently contained in rule 62 of the Australia/Netherlands paper (A/AC.249/L.2).

[(a) the name of the tribunal and the date it is delivered, the first names and surname of the accused and any other personal data that may help to determine his identity;

(b) the description of the facts and circumstances set forth in the indictment or its amendment;

(c) the vote of the judges and a brief exposition of their grounds on fact and law;

(d) the precise determination of the fact that the Trial Chamber deems proved;

(e) the verdict, mentioning the legal dispositions applicable;

(f) the signatures of the judges, but if one of the members of the Trial Chamber were unable to sign the judgement because of an impediment [posterior] [subsequent] to the deliberation and voting, the fact shall be recorded and the judgement shall be valid without his or her signature]

[The judgement shall not exceed the facts and circumstances described in the indictment or in its amendment, if any].

It [shall be the sole judgement issued] [may contain dissenting opinions].

G. Compensation for the victims

1. The Registrar shall transmit to the competent authorities of the States concerned the judgement by which the accused was found guilty of an offence which caused damage to the victim.

2. The victims or his successors and assigns may, in accordance with the applicable national law, institute proceedings in a national jurisdiction or any other competent institution in order to obtain compensation for the prejudice caused to them.

3. The judgement of the Court shall be binding on the national jurisdictions of every State party as regards the criminal liability of the person convicted and the principles relating to compensation for damage caused to victims and the restitution of property unlawfully acquired by the person convicted.

[Note. The fifth paragraph of article 127 of the French paper (A/AC.249/L.3) dealing with the power of the Court to establish principles relating to compensation and restitution is found in section D (Pronouncement of judgement/majority decision) above.]

H. Consequences of a judgement on the individual

1. If the accused is acquitted, if he is sentenced to payment of a fine or if he is sentenced to a term of imprisonment already covered by his period in detention, he shall be released immediately unless he is retained for another case by the organs of the Court or by the judicial authorities of a State Party.

2. In all other cases, the Trial Chamber may, if the circumstances justify prolongation of a measure of security, by a special reasoned decision, maintain

the detention of the accused. In this case, so long as the judgement is not final and during appeal proceedings, if any, the convicted person shall remain in detention until such time as the period of detention equals the sentence handed down, without prejudice to application of the provisions of article ___. 67/

67/ Provision on pre-trial detention [and judicial supervision]; see article 29 of the ILC draft and article 99 of the French paper (A/AC.249/L.3).

Article 46

Sentencing

I. ILC DRAFT

1. In the event of a conviction, the Trial Chamber shall hold a further hearing to hear any evidence relevant to sentence, to allow the Prosecutor and the defence to make submissions and to consider the appropriate sentence to be imposed.

2. In imposing sentence, the Trial Chamber should take into account such factors as the gravity of the crime and the individual circumstances of the convicted person.

II. PROPOSALS

1. [In the event of a conviction, the Trial Chamber shall hold a further hearing [pre-sentencing hearing] to hear any evidence relevant to sentence, to allow the Prosecutor and the defence to make submissions and to consider the appropriate sentence to be imposed.] [The Trial Chamber should take into account such factors as the gravity of the crime and the individual circumstances of the convicted person.] [These submissions may go to aggravation, extenuation or mitigation evidence, or the issue of rehabilitation.]

1 bis. [At such hearing the parties shall ordinarily present submissions in the following manner:

(a) presentation by the Prosecutor;

(b) presentation by the defence;

(c) prosecution rebuttal;

(d) defence surrebuttal;

(e) argument by the Prosecutor on sentence;

(f) argument by the defence on sentence.]

2. [The Trial Chamber may impose the penalties provided for in the Statute.]

3. [The Trial Chamber shall indicate whether multiple sentences shall be served consecutively or concurrently.]

4. [The sentence shall be pronounced in public and in the presence of the convicted person.]

Article 47*

Applicable penalties

I. ILC DRAFT

1. The Court may impose on a person convicted of a crime under this Statute one or more of the following penalties:

(a) a term of life imprisonment, or of imprisonment for a specified number of years;

(b) a fine.

2. In determining the length of a term of imprisonment or the amount of a fine to be imposed, the Court may have regard to the penalties provided for by the law of:

(a) the State of which the convicted person is a national;

(b) the State where the crime was committed; and

(c) the State which had custody of and jurisdiction over the accused.

3. Fines paid may be transferred, by order of the Court, to one or more of the following:

(a) the Registrar, to defray the costs of the trial;

(b) a State the nationals of which were the victims of the crime;

(c) a trust fund established by the Secretary-General of the United Nations for the benefit of victims of crime.

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* Note

The compilation on article 47 was prepared by an informal group. It is designed to reflect the proposals of delegations made during the course of discussions on the issue of penalties. It follows the original text of the ILC draft Statute; amendments are represented in bold type.

Where a deletion of text has been proposed, the original text is surrounded by parentheses which are in bold type. Where an addition of text has been proposed, the original text is interrupted by square brackets, which contain the proposed additional text in bold type.

This compilation is not exhaustive. The texts included do not reflect any generally held views and do not prejudge the future positions of delegations.

II. PROPOSALS

Paragraph 1 68/

"(The Court may impose on a person convicted of a crime under this Statute one or more of the following penalties:

(a) a term of life imprisonment, or of imprisonment for a specified number of years;

(b) a fine. 69/

[(c) a disenfranchisement in the modality and to the extent such penalty could be imposed in accordance with the laws mentioned in paragraph 2.] or **[(c) a forfeiture]).** 70/

OR

[1. In the case of a physical person who is found guilty, the penalty of imprisonment incurred shall be life imprisonment.

2. The Court may, however, impose a sentence of imprisonment for a specified number of years if there are grounds for mitigation of criminal responsibility or if it recognizes the existence of mitigating circumstances, bearing in mind in particular the special circumstances of the case, the personality of the guilty party and his degree of involvement in the crime in question.

In the case referred to in the preceding paragraph, the sentence of imprisonment imposed may not be more than 30 years.

3. In the case of a person aged 13 to 18 years at the time of the facts who is found guilty, the Court may not impose a sentence of more than 20 years imprisonment. However, by way of exception and taking into account the circumstances of the case and the personality of the person concerned, the Court may decide that there are no grounds for mitigation and impose a sentence under the same conditions as those referred to in paragraphs 1 and 2 of this article. The Court shall give its specific reasons for such a decision.

68/ Some delegations expressed the view that there should be more precise maximum penalties of imprisonment set forth as part of the definitions of specific crimes within the jurisdiction of the International Criminal Court. For example, as to certain violations of the laws and customs of war, delegations may wish to consider whether it would be appropriate to specify a maximum penalty of a fixed number of years' imprisonment.

69/ The question has been raised as to whether the International Criminal Court should concern itself with the collection of pecuniary sanctions, other than for the purpose of compensating victims.

70/ One delegation observed that the inclusion of the penalty of forfeiture in article 47 will provide effective enforcement mechanism for the economic crime resulting in international social problems such as crimes of drug trafficking which may fall under the definition of the serious crimes of international concern under article 20 (e) of the ILC draft. Should in the future these crimes be listed in the Annex of article 20 (e), there will be no need to amend the Statute to incorporate such penalty to govern the said crimes.

4. In the case of a physical person who is found guilty, the Court may also impose a fine, the amount of which shall be freely set by it.

5. In the case of physical persons who are found guilty, fines may be imposed in addition to sentences of imprisonment.]

OR

[The Court may impose on a person convicted of a crime under this Statute a life imprisonment, or of imprisonment for a specified number of years and months.

The Court may impose on a person convicted of a perjury or contempt of the Court a fine.] 71/

OR

[The Court may impose terms of imprisonment on persons convicted of crimes under this Statute. Terms of imprisonment may be combined with fines.]

OR

[The punishment which this Court may impose is:

(a) imprisonment for life; or

(b) imprisonment for a definite term between twenty and forty years, unless it is reduced according to the provisions of this Statute.]

OR

[The Court may impose on a person convicted of a crime under this Statute one or more of the following penalties:

(a) death penalty, as an option, in case of aggravating circumstances and when the Trial Chamber finds it necessary in light of the gravity of the crime, the number of victims and the severity of the damage;

(b) a term of life imprisonment, or of imprisonment for a specified number of years;

(c) a fine.]

OR

71/ One delegation pointed out that article 44 of the report by the informal group on procedure, which contains proposals for definitions of crimes, including perjury and contempt, should also be reviewed. Some of those proposals contain provisions for penalties of imprisonment.

[The Court may apply the following penalties and security measures: 72/

(a) imprisonment;

(b) pecuniary sanctions; 73/

(c) seizure of instruments and objects of the crime;

(d) suspension or loss of rights;

(e) disqualification, dismissal or suspension from office or employment.]"

A. Aggravating and mitigating circumstances

[Note. Delegates may wish to deal in this context with the issues treated in article 46 (2) of the ILC draft. Thus, a possibility would be to delete article 46 (2) and insert it as a new paragraph of article 47, as is done here:

In imposing sentence, the Trial Chamber (should) **[shall]** take into account such factors as the gravity of the crime**[, the extent and severity of the damage or injury caused]** and the individual circumstances of the convicted person**[, including any previous convictions of the convicted person]**.

OR

[When the Court finds extenuating circumstances concerning criminal conduct of the defendant, it may reduce the sentence of imprisonment.]

OR

[In determining the sentence, the Trial Chamber shall take into account the factors mentioned in article ... of the Statute, as well as any factors such as

(a) any aggravating circumstances, including:

(i) the impact of the crime on the victims;

(ii) the extent of damage caused by the convicted person's conduct;

(b) any mitigating circumstances, including: the substantial cooperation with the Prosecutor by the convicted person before or after conviction;

(c) the time which the convicted person has already been detained for on the charges;

(d) the extent to which any penalty imposed by a court of any State on the convicted person for the same act has already been served, as referred to in article ... (A 42 (3) (ILC) of the Statute.]

72/ The type of sanction applicable to each one of the crimes which come under the jurisdiction of the Court should be specified in the chapter on definitions, so as to include both the provision as well as the penalty in the same article.

73/ Pecuniary sanctions may include both a fine and a compensation.

OR

[The Court may, within the limits permitted by this Statute, apply the penalties established for each crime, individualizing them on the basis of the severity of the crime and the agent's degree of responsibility, bearing in mind:

(a) the extent of the damage caused or the danger posed;

(b) the nature of the illicit behaviour and the means employed to execute it;

(c) the circumstances of time, mode and place of the act executed;

(d) the form and degree of intervention of the agent in the commission of the crime, as well as his or her capacity and that of the victim;

(e) the age, education, culture, customs, social and economic condition of the agent, as well as the motives which induced him to commit the crime.]

B. Minimum periods of imprisonment

[1. When the Court imposes a sentence of imprisonment of more than five years, it may attach to the sentence a minimum period during which the guilty party may not be granted any reduction or amendment of his sentence as provided for in Part [...] of this Statute.

2. The duration of the minimum period shall be freely set by the Court, but it may not exceed either two thirds of the sentence in the case of imprisonment for a specified number of years or 22 years in the case of life imprisonment.]

C. Concurrence of offences

[When a person has committed more than one offence, the Court shall:

(a) when imprisonment for life is to be imposed for one of these offences, pronounce a single sentence of imprisonment for life; or

(b) otherwise, pronounce a single sentence for a definite term, the maximum of which shall be the maximum sentence prescribed for the gravest crimes increased by one half.]

OR

[1. Concurrence of offences occurs when an offence is committed by a person before he has finally been sentenced by the Court for another offence.

2. When, in the course of the same proceedings, a physical person is convicted by the Court of several concurrent offences within the meaning of paragraph 1 of this article, only one sentence of imprisonment may be imposed on him, under the conditions provided for in [...]. This sentence shall be deemed common to the concurrent offences.

3. When, in the course of separate proceedings, a physical person is convicted by the Court of several concurrent offences within the meaning of paragraph 1 of

this article, several sentences of imprisonment may be imposed on him, under the conditions provided for in [...]. Such sentences shall run consecutively.

In such cases the Court may order that all or part of the sentences of imprisonment shall be served concurrently. Concurrency shall be automatic when one of the sentences is life imprisonment.

4. Fines imposed on physical persons may be cumulative with each other and with fines imposed for concurrent crimes within the meaning of paragraph 1 of this article.]

D. Prior detention

[If a sentence of imprisonment is imposed, the actual period of imprisonment to be served by the convicted person shall be reduced by the time which he or she has already been detained prior to sentencing.]

OR

[If the accused is acquitted, if he is sentenced to payment of a fine or if he is sentenced to a term of imprisonment already covered by his period in detention, he shall be released immediately unless he is retained for another case by the organs of the Court or by the judicial authorities of a State Party.]

Paragraph 2

(In determining the length of a term of imprisonment or the amount of a fine to be imposed, the Court may have regard to the penalties provided for by the law of) or **[In determining the length of a term of imprisonment, the amount of a fine to be imposed, or the property to be forfeited, the Court shall impose the highest penalty provided for by the law of either]**: 74/

(a) the State of which the convicted person is a national;

(b) the State where the crime was committed; **[or]**

(c) the State which had custody of and jurisdiction over the accused.)

OR

[In determining the penalty imposed, the Court will have regard to the penalties provided for by the law of the State of the nationality of the offender. In cases where national law does not regulate a specific crime, the Court will apply penalties ascribed to analogous crimes in the same national law.] 75/

74/ One delegation expressed the view that the language of the present article 47, paragraph 2, will result in an uncertainty arising from problems of concurrent jurisdictions. The Court will be accorded too broad discretion as to the degree of penalty it will impose on the defendant. The amendment to the second paragraph, therefore, is necessary to provide more certainty and transparency to such a provision.

75/ This proposal intends to solve the question of legality and at the same time accommodate differences of legal systems concerning penalties.

E. Confiscation

[1. The following may be confiscated:

(a) an object which has been used or was intended to be used in the commission of the criminal conduct;

(b) an object or profit obtained by criminal conduct.

2. When the whole or a part of an object or profit mentioned in paragraph 1 cannot be confiscated, a sum of money equivalent thereto may be collected.]

OR

[The Court may confiscate any object which has served to commit a crime and order the return to their rightful owners of any property and proceeds acquired by criminal conduct.]

AND/OR

[1. The judgement of the Court shall be binding on the national jurisdictions of every State Party as regards the criminal liability of the person convicted and the principles relating to compensation for damage caused to victims and the restitution of property acquired by the person convicted.

2. For the purpose of enforcement of fines imposed by the Court, the Presidency may order the forced sale of any property of the person sentenced which is on the territory of a State Party.

For the same purpose, the Presidency may order the confiscation of any sum of money or securities belonging to the person sentenced.

Decisions by the Presidency are implemented by States Parties in conformity with their domestic laws.

The provisions of this article shall apply to juridical persons.]

Paragraph 3

"(Fines paid may be transferred, by order of the Court, to one or more of the following:

(a) the Registrar, to defray the costs of the trial;

(b) a State the nationals of which were the victims of the crime;

(c) a trust fund established by the Secretary-General of the United Nations for the benefit of victims of crime.)

OR

[Fines paid will be transferred to the Registrar to defray the costs of the trial.]"

OR

[Fines may be transferred, by order of the Court, to one or the other of the following, or be distributed between:

(a) the Registrar, to defray the costs of the trial;

(b) a trust fund administered by the Court for the benefit of victims of crime.]

F. Juridical persons (article 47 bis)

[1. In respect of all the crimes referred to in [...], juridical persons who are held to be criminally responsible by the Court shall incur the following penalties:

(a) fines, the amount of which shall be freely set by the Court;

(b) dissolution;

(c) prohibition, in perpetuity or for a period freely determined by the Court, of the direct or indirect exercise of one or more professional or social activities;

(d) closure, in perpetuity or for a period freely determined by the Court, of the establishments used in the commission of the crimes;

(e) confiscation of any item used in the commission of the crimes or which is a product of the crimes.

2. The penalties provided for in paragraph 1 of this article may be cumulative with each other or with penalties imposed for concurrent crimes within the meaning of [...] of this Statute.]

PART 6. APPEAL AND REVIEW 76/

Article 48

Appeal against judgement or sentence

I. ILC DRAFT

> 1. The Prosecutor and the convicted person may, in accordance with the Rules, appeal against a decision under articles 45 or 47 on grounds of procedural error, error of fact or of law, or disproportion between the crime and the sentence.
>
> 2. Unless the Trial Chamber otherwise orders, a convicted person shall remain in custody pending an appeal.

II. PROPOSALS

1. The Prosecutor and the convicted person [accused], may in accordance with the rules (of the Court), appeal [before the Appeals chamber] against (his) (his/her) (a)

[decision under articles 45 or 47 (ILC) on the grounds of procedural error, error of fact or of law, or disproportion between the crime and the sentence [or against a decision rendered in absentia under article 37, paragraph 2]]

[conviction and sentence on grounds of procedural error, error of fact or law, or disproportion between the crime and the sentence].

[Judgements given on the merits of the case by the Trial Chamber, with the exception of those given in the absence of the accused, as provided for in article 112, paragraph 4.

An appeal against judgements given on the merits in the absence of the accused shall be allowed if the latter accepts the judgement or was represented during the trial before the Trial Chamber by defence counsel appointed by him.

The appeal may be general or may relate exclusively to the magnitude of the penalty.]

2. [The Appeals Chamber may hear interlocutory appeals on the grounds provided for in article X.]

3. [An appeal shall be lodged within [30] days of the decision being challenged, or such longer time as the Presidency may allow.]

4. [Unless the Trial Chamber otherwise orders, a convicted person shall remain in custody pending an appeal.]

[In case of an acquittal, the accused shall be released immediately.

76/ See the footnote to the proposals on the preamble, at the beginning of the present volume.

If, at the time the judgement is pronounced, the Prosecutor advises the Trial Chamber in open court of his or her intention to file notice of appeal, the Trial Chamber may, at the request of the Prosecutor, issue a warrant for the arrest of the acquitted person to take effect immediately.

The Trial Chamber shall not issue an arrest warrant unless it is satisfied that the acquitted person may not be readily returned to custody if judgement is reversed.]

[The sentence shall begin to run from the day it is pronounced. However, as soon as notice of appeal is given, the enforcement of the judgement shall thereupon be stayed until the decision on appeal has been delivered, the convicted person meanwhile remaining in detention.

If, by a previous decision of the Trial Chamber, the convicted person has been released, or is for any other reason at liberty, and he or she is not present when the Judgement is pronounced, the Trial Chamber shall issue a warrant for his or her arrest.]

[Execution of the judgement shall be suspended during the period allowed for appeal and for the duration of the appeal proceedings.]

Article 49

Proceedings on appeal

I. ILC DRAFT

1. The Appeals Chamber has all the powers of the Trial Chamber.

2. If the Appeals Chamber finds that the proceedings appealed from were unfair or that the decision is vitiated by error of fact or law, it may:

(a) if the appeal is brought by the convicted person, reverse or amend the decision, or, if necessary, order a new trial;

(b) if the appeal is brought by the Prosecutor against an acquittal, order a new trial.

3. If in an appeal against sentence the Chamber finds that the sentence is manifestly disproportionate to the crime, it may vary the sentence in accordance with article 47.

4. The decision of the Chamber shall be taken by a majority of the judges, and shall be delivered in open court. Six judges constitute a quorum.

5. Subject to article 50, the decision of the Chamber shall be final.

II. PROPOSALS

1. [The Appeals Chamber has all the powers of the Trial Chamber.]

[The rules of procedure laid down for the Trial Chamber shall apply in the Appeals Chamber, subject to articles 107, 115, 116 and 130 and the following provisions.]

[The rules of procedure and evidence that govern proceedings in the Trial Chambers shall apply mutatis mutandis to proceedings in the Appeals Chamber.]

[The rules of procedure and evidence that govern proceedings in the Trial Chambers shall apply mutatis mutandis to proceedings provided by the preceding two paragraphs. Further rules that govern those proceedings shall be provided for in the rules of Court.]

2. [If the Appeals Chamber finds that the proceedings appealed from were unfair or that the decision is vitiated by error of fact or law, it may:

(a) if the appeal is brought by the convicted person, reverse or amend the decision, or, if necessary, order a new trial;

(b) if the appeal is brought by the Prosecutor against an acquittal, order a new trial.]

[The Court shall admit a plea of nullity based on nullity of the procedure followed in the Trial Chamber with regard to evidence produced in that Chamber, if the nullity is referred to by the President, the prosecutor or the accused in the course of proceedings in the Appeals Chamber and has already been raised in the Trial Chamber.

Other defences based on nullity of the procedure followed in the Trial Chamber shall not be admissible.

Defences based on nullity of the summons to appear before the Appeals Chamber must, to be admissible, be raised by the parties at the opening of proceedings, before the reading of the judgement of the Trial Chamber and of the notice of appeal.]

3. [If in an appeal against sentence the Chamber finds that the sentence is manifestly disproportionate to the crime, it may vary the sentence in accordance with article 47.]

4. [The decision of the Chamber shall be taken by a majority of the judges, and shall be delivered in open court [on a date of which notice has been given to the parties and counsel and at which they shall be entitled to be present]. Six judges constitute a quorum.]

[The Appeals Chamber shall pronounce judgement on the basis of the record on appeal together with such additional evidence as it has authorized.

The judgement shall be accompanied or followed as soon as possible by a reasoned opinion in writing, to which separate or dissenting opinions may be appended.]

[The Appeals Chamber may rule only on objections formulated by the parties in their appeals. When the decision has been appealed only by the accused, it cannot be amended to his or her detriment.]

5. [The Appeals Chamber may grant compensation to a person who was held in pre-trial detention during proceedings against him that have concluded with a final decision of acquittal. The compensation shall be based on the prejudice caused to him by such detention.]

6. [Subject to article 50, the decision of the Chamber shall be final.]

7. [A sentence pronounced by the Appeals Chamber shall be enforced immediately.

Where the accused is not present when the judgement is due to be delivered, either as having been acquitted on all charges or for any other reason, the Appeals Chamber may deliver its Judgement in the absence of the accused and shall, unless it pronounces his or her acquittal, order his or her arrest or surrender to the Tribunal.]

A. Notice of appeal

1. [Subject to (B), a party seeking to appeal under article X (A 48 ILC) of the Statute a judgement or sentence shall, not more than thirty days from the date on which the judgement or sentence was pronounced, file with the Registrar and serve upon the other party a written notice of appeal, setting forth the grounds. [The supplementary rules shall provide for the form and any related

requirements of a notice of appeal.] [It shall be signed by the Registrar and by the appellant or by his defence counsel.]

[If the appellant is in detention, the appeal may be effected by means of a declaration to the head of the prison facility. The declaration shall be noted, dated and signed by the head of the prison facility and the appellant. It shall be transmitted promptly to the Registrar of the Court who shall notify the other parties of the appeal.]

[(B) The Appeals Chamber may extend the period up to an additional thirty days for good cause.]

[The Appeals Chamber shall be seized of the case by the notice of the appeal.]

[An appeal shall be lodged within [30] days of the decision being challenged, or such longer time as the Presidency may allow.]

[An appeal shall be lodged within 30 days if it relates to the judgement on merits or to a judgement terminating the proceedings.

The time limit shall be eight days where the Court rules on an application for release or on an application for the lifting of a restriction or a modification of judicial supervision.

This period shall run from the date of the pronouncement of the judgement.

However, it shall run only from the date of notification of the judgement:

(a) for an accused who was not present or represented at the hearing where the judgement was pronounced, but only in those cases where he himself or his defence counsel was not informed of the date on which the judgement would be pronounced;

(b) for an accused who requested that he be tried in absentia in accordance with the provisions of article 111, paragraph 1 (b).]

[If notice of appeal is not filed within the required time limit, or if a properly filed appeal is discontinued in all respects, the judgement or sentence shall be deemed to be final and subject only to revision pursuant to article X (A 50 ILC) of the Statute.]

B. Interlocutory appeals

[Subject to (B), a party seeking to make an interlocutory appeal shall not more than ten days from the date on which the Trial Chamber ruled on the preliminary motion, file with the Registrar and serve upon the other party a written notice of interlocutory appeal, setting forth the grounds. The supplementary rules shall provide for the form and any related requirements of an interlocutory appeal notice of appeal.

(B) The Appeals Chamber may extend the period up to an additional five days for good cause.]

[Judgements of the Trial Chamber other than those given on the merits may be appealed against if:

(a) they terminate the proceedings;

(b) they provide for committal in custody or judicial supervision.

Judgements of the Trial Chamber other than those given on the merits and which are not referred to in the present article may not be the subject of appeal.

Appeals lodged against the judgements referred to in the present article shall not have suspensive effect. They shall be brought before the Appeals Chamber.] 77/

C. Appeals by both parties

[When both parties file a notice of appeal, the party lodging the earliest notice shall be deemed to be the appellant and, accordingly, the other party shall be deemed to be the respondent.]

D. Discontinuance of appeal

[An appellant, including the party deemed to be the respondent, may at any time file with the Registrar a written notice of discontinuance of appeal. The Registrar shall inform the other party that the notice has been filed. Upon filing of the notice, the appeal shall be abandoned.]

E. Record on appeal

[The record on appeal shall consist of the trial record, as certified by the Trial Chamber.]

[Note. There may be grounds for limiting the record on appeal to that part of the trial record going to the matters in dispute.]

F. Copies of record

[The Registrar shall make a sufficient number of copies of the record on appeal for the use of the Judges of the Appeals Chamber and of the parties.]

[Persons who have been convicted shall be entitled to delivery to them by the Registrar of the Court of certified true copies of the judgement of the Trial Chamber and of the complete record of the deliberations.]

G. Appellant's brief

[An appellant's brief of argument and authorities shall be served on the other party and filed with the Registrar within thirty days of the date of the filing of the notice of appeal. The Appeals Chamber may for good cause extend the period up to additional ten days.

77/ See also rule 78 proposed by Australia and the Netherlands (A/AC.249/L.2).

The appellant's brief shall satisfy the requirements as to the form, content and length of briefs laid down in the supplementary rules.]

H. Respondent's brief

[A respondent's brief of argument and authorities shall be served on the other party and filed with the Registrar within thirty days of the filing of the appellant's brief. The Appeals Chamber may extend the period up to an additional ten days for good cause.

The respondent's brief shall satisfy the requirements as to the form, content and length of briefs laid down in the supplementary rules.]

I. Brief in reply

[An appellant may file a brief in reply within ten days after the filing of the respondent's brief. The Appeals Chamber may extend the period up to an additional five days for good cause.]

J. Requirement for brief where appellant or respondent is not represented by counsel

[Where the appellant or respondent is not represented by counsel, the Appeals Chamber may order that he or she need not file a brief, or may file a brief in a modified form.]

K. Briefs submitted on behalf of interested persons or organizations

[A brief submitted on behalf of an interested person may be filed only by invitation of the Appeals Chamber or by motion for leave to file granted by the Appeals Chamber.

A brief submitted shall be filed with the Registrar who shall provide copies to the appellant and respondent.

The Appeals Chamber shall determine what time limits should govern the filing of such briefs.

The supplementary rules shall specify the requirements as to the form, content and length of such briefs.]

L. Date of hearing

[After the expiry of the time-limits for filing the briefs, the Appeals Chamber shall set the date for the hearing and the Registrar shall notify the parties.]

M. Conduct of hearing

[The supplementary rules shall govern the conduct of the hearing.]

N. Additional evidence

[A party may apply by motion to present before the Appeals Chamber additional evidence which was not available to it at the trial. Such motion must be served on the other party and filed with the Registrar not less than fifteen days before the date of the hearing.

The Appeals Chamber shall authorize the presentation of such evidence if it considers that the interests of justice so require.]

O. Expedited appeals procedure

[An interlocutory appeal shall be heard expeditiously on the basis of the original record of the Trial Chamber and without the necessity of any written brief.

All delays and other procedural requirements shall be fixed by an order of the President issued on an application by one of the parties or proprio motu should no such application have been made within fifteen days after the filing of the notice of interlocutory appeal.]

Article 50

Revision

I. ILC DRAFT

1. The convicted person or the Prosecutor may, in accordance with the Rules, apply to the Presidency for revision of a conviction on the ground that evidence has been discovered which was not available to the applicant at the time the conviction was pronounced or affirmed and which could have been a decisive factor in the conviction.

2. The Presidency shall request the prosecutor or the convicted person, as the case may be, to present written observations on whether the application should be accepted.

3. If the Presidency is of the view that the new evidence could lead to the revision of the conviction, it may:

(a) reconvene the Trial Chamber;

(b) constitute a new Trial Chamber; or

(c) refer the matter to the Appeals Chamber;

with a view to the Chamber determining, after hearing the parties, whether the new evidence should lead to a revision of the conviction.

II. PROPOSALS

1. An application for the revision of a conviction [final judgement in a criminal case] may be made to the [Presidency] [court which rendered the original judgement], in accordance with the rules (of the Court), by:

(a) the Prosecutor (of the Court); or

(b) the person convicted [and, after the death of the latter, by his spouse, his children, his relatives or any persons having express instructions to apply for revision].

2. An application may be made on the following grounds:

[evidence has been discovered which was not available to the applicant at the time the conviction was pronounced or affirmed and which could have been a decisive factor in the conviction]

[a new circumstance or evidence of which the Court was unaware at the time of the trial occurs or becomes known and is such as to create doubt as to the guilt of the person convicted]

[new evidence is found which was not available at the time of the passing or confirmation of the sentence and which could have had a decisive influence on the sentence]

[it is proved that a decisive piece of evidence which was taken into account when passing the sentence does not possess the value which had been assigned to it because it is false, invalid, or it has been forged or falsified]

[it is proved that one of the judges who participated in the sentence or in its confirmation has committed in that case a serious breach of his duties]

[a previous judicial judgement on which the sentence was based has been annulled]

[a more benign penal law than the one applied in the sentence becomes retroactively applicable]

3. [The applicant shall file with the Registrar and serve upon the other party a written application for revision, setting forth the grounds.] [The supplementary rules shall provide for the form and any related requirements of an application for revision.]

4. [[The Presidency] shall request the Prosecutor or the convicted person, as the case may be, to present written observations on whether the application should be accepted.]

[[The Presidency] shall, either directly or within the framework of an application for judicial assistance, undertake such investigation and verification as may be required. It may, at any time, order the suspension of execution of the sentence.]

[[The Presidency] shall rule on the application following a public hearing at which the oral or written observations of the appellant or his defence counsel and of the Prosecutor shall be recorded. [The Presidency] shall announce the grounds for the decision, which shall not be subject to appeal.]

5. [The rules of procedure and evidence that govern proceedings in the Trial Chambers shall apply mutatis mutandis to proceedings provided by the previous paragraphs. Further rules that govern those proceedings shall be provided in the rules of the Court.]

6. [If the [Presidency] is of the view that the new evidence could lead to the revision of the conviction, it may:

(a) reconvene the Trial Chamber;

(b) constitute a new Trial Chamber; or

(c) refer the matter to the Appeals Chamber,

with a view to the Chamber determining, after hearing the parties, whether the new evidence should lead to the revision of the conviction.]

[[The Presidency] shall reject the application if it considers the latter unfounded. If it considers there are valid grounds for the application, it shall annul the conviction and refer the accused to a jurisdiction at the same level as but having a composition different from that of the jurisdiction which handed down the annulled decision.]

[The Court may award compensation to a convicted person who is found innocent under the present title, the compensation to be in the amount of the prejudice caused by the conviction, unless it is demonstrated that he was responsible for a failure to produce new evidence or to reveal an unknown factor in good time.]

PART 7. INTERNATIONAL COOPERATION AND JUDICIAL ASSISTANCE* 78/

[Article X 79/

[Reciprocity] Obligation to cooperate and general provisions 80/

A. General obligation to cooperate

1. States Parties shall, in accordance with the provisions of this Part, cooperate with the Court in its investigation and prosecution of crimes under this Statute. A State shall not deny a request for cooperation except as specifically provided in this Part.

* * *

[[States Parties shall afford to the Court the widest possible measure of mutual assistance] or [States Parties and the Court shall afford each other reciprocal cooperation and mutual assistance] in connection with [the] criminal investigations and proceedings under this Statute.]

* * *

States Non-Parties may offer their assistance to the Court under conditions determined by them or pursuant to a specific agreement.

* * *

States Parties shall respond without undue delay to the request.

* * *

States Parties shall respond without delay to any request for cooperation submitted by the Court under this Statute. They may request the Court to provide any additional information which they consider necessary to enable them to respond to the request.

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* Note. These proposals and compilations were prepared by an informal group dealing with Part 7. They neither represent a text agreed upon among delegations nor suggest that every item should be included in the Statute. They identify possible elements to be included and examples of some possible texts. The order of the articles as well as the headings are only of an indicative character and have not been finally agreed upon.

78/ Not all assistance is provided by judicial authorities. "Mutual assistance", which is developing into a term of art, may be a better option and has throughout the text been inserted in square brackets after "judicial".

79/ Some delegations are of the view that the obligation to cooperate should be subject to certain preconditions. Therefore, there is no need as such in the Statute for an article X, which may cause some confusion on the understanding of obligation and limitations on it.

80/ This provision reflects the need for a general statement of the obligation of States to cooperate with the Court and related matters.

The obligation to cooperate provided for in paragraph 1 of this article shall be discharged in accordance with the conditions set out in this Statute.

* * *

States Parties shall respond without delay to any request for cooperation submitted by the Court under this Statute. They may request the Court to provide any additional information which they consider necessary to enable them to respond to the request.

* * *

The Court may request the extradition of a fugitive to States Parties as regards an offence specified in article [ ] when the Court has issued a warrant of arrest.

* * *

[Note. Another option is to couch this provision in reciprocal terms.]

B. Channels for communication of requests/Authorities competent to make and receive requests

2. [Requests for cooperation may be made by the Court, [or Prosecutor] and shall be transmitted through diplomatic channels, unless the Court and the requested State agree on another mode for transmitting the requests.] 81/

* * *

The request under paragraph 1 shall be made in written form through diplomatic channels. If a requested State considers the information and evidence provided by the Court insufficient as a basis for decisions whether to offer assistance, it may seek further information and evidence from the Court as it deems necessary.

All the documents to be provided by the Court to State Party shall be accompanied by a duly certified translation in the language of the party.

* * *

The requested State shall through diplomatic channels promptly notify the court of its decision as regards the request for extradition.

* * *

81/ An alternative would be to provide that "Communications relating to a request under this Part shall be between the Registrar, or Prosecutor acting under article 26, and the national authority designated by each State party for this purpose [unless otherwise permitted by the laws of that State party]. See also article 53 (1) and 57 (2).

The ILC draft Statute commingles provisions of mutual assistance on the one hand, and arrest and surrender on the other. In this text these two aspects have been separated into two distinct provisions, respectively articles 51 and 53. Each provision contains its own provisions relating to the obligation to cooperate and the grounds for denial of the request.

Each State Party shall designate, at the time of deposition of its instruments of ratification, the national authority competent to receive requests for cooperation transmitted by the Court and the various authorities to which requests for cooperation may be submitted, as determined by the urgency of the request and the means of its transmission.

However, a State Party may amend the list of competent national authorities subsequent to ratification, but such amendment shall not be opposable until six months have elapsed from the date of its deposition.

* * *

Requests for cooperation shall be transmitted to States by the Registrar. The replies of States shall be addressed to him, as shall any accompanying documents or papers.

* * *

[Note. Alternatively reliance could be had on cooperation between States (see A/AC.249/1, para. 179) or a combination of the two systems.]

C. States Parties' failure to cooperate 82/

3. Where non-cooperation by States with requests by the Court [or Prosecutor] prevents the Court from performing its duties in terms of this Statute, the Court may request the Security Council to take the measures necessary to enable the Court to exercise its jurisdiction, in relation to both States Parties to this Statute, or States not parties.

* * *

The Preliminary Investigations Chamber of the Court may bring to the attention of the Security Council any failure to discharge the obligation to cooperate provided for in paragraph 1 of this article which obstructs the performance of the Chamber's functions. 83/

82/ Reservations were expressed regarding the role of the Security Council in the Court. Some delegations consider that it should not be involved in any way in the work of the Court while others underscored that all provisions in the Statute pertaining to its role should confirm to the agreement to be reached on principles of relationship between the Court and the United Nations among the States Members of the United Nations. The legal basis of the role of the Security Council will also have to be viewed in the context of the powers of the Security Council in the Charter of the United Nations.

83/ Paragraph 1 deals with the general obligation to cooperate with the Court.

D. Cooperation by non-States Parties

4. The Court may call on any State not party to this Statute to provide assistance 84/ provided for in this Part on the basis of comity, an ad hoc arrangement or through entry into agreement with such State. 85/

* * *

The Court may also make a request under paragraph 1 to any non-State Party. Non-State Parties may honour the request and provide necessary assistance in accordance with their national laws.

* * *

States non-parties may offer their assistance to the Court under conditions determined by them or pursuant to a specific agreement with the Court.

E. Language of requests and answers 86/

5. [Requests for cooperation shall be in an official language of the requested State unless otherwise agreed.]

* * *

The request under paragraph 1 shall be made in written form through diplomatic channels. If a requested State considers the information and evidence provided by the Court insufficient as a basis for decisions whether to offer assistance, it may seek further information and evidence from the Court as it deems necessary.

All the documents to be provided by the Court to State Party shall be accompanied by a duly certified translation in the language of the Party.

* * *

Requests for cooperation addressed to States Parties by the Court shall be drafted in one of the two working languages referred to in article 25, in accordance with the choice made by that State at the time of deposition of its instruments of ratification.

84/ See Syracusa draft, article 56. This is preferable to article 56 of the ILC draft, which formulates the same principle in the form of an entitlement to States which are not party to the Statute. It appears more correct to formulate the principle as empowering the Court to request cooperation, leaving open the reaction of the requested State.

85/ This could form the substance of a separate article. It should also be considered whether a provision should be added providing that the Court shall have the power to respond to any counter-request by such a State that has been requested to cooperate.

86/ The issue of the working languages of the Court has not yet been addressed by the Preparatory Committee. Some delegations expressed doubts about the current drafting of article 25 of the Statute.

The same shall apply to papers and documents transmitted to the Court by States Parties in response to the requests referred to in paragraph 1 of this article. The Court may also request the transmission of documents in their original language.

* * *

[Note. It was mentioned that in the field of international cooperation there exists no obligation to translate documents transmitted in the execution of a request.]

F. Extent to which national law controls procedures for execution of requests

6. States Party to this Statute shall inform the Registrar of any conditions under their laws that requests for cooperation and judicial [mutual] assistance are required to comply with, and of any amendments to such laws.

* * *

The obligation to cooperate provided for in paragraph 1 of this article shall be discharged in accordance with the conditions set out in this Statute.

Subject to the provisions of paragraph 2 of this article, the procedure by which a State Party discharges its obligation to cooperate shall be governed by its internal law. 87/

* * *

The Court may also make a request under paragraph 1 to any Non-State Party. Non-State Parties may honour the request and provide necessary assistance in accordance with their national laws.

* * *

States Parties shall undertake to extradite to the Court any fugitive requested for extradition and found in their territories in accordance with this Statute and their national laws.

When a State Party honours the request for extradition, it shall promptly detain the fugitive under its national laws.

The request for extradition shall include a description of the identity of the fugitive and the facts of the case, and shall contain such further information as may be required by the laws of the requested State.

* * *

In cases of urgency, when the Court makes a request for provisional detention, notifying the requested Party that a warrant of arrest has been issued or a sentence has been imposed for an offence specified in article [ ], the requested State Party may provisionally detain the person sought in accordance with its national laws.

87/ Paragraph 2 deals with the obligation to cooperate.

The request for provisional detention shall describe the identity of the person to be sought and the facts of the case, and shall contain such further information as may be required by the laws of the requested State.

* * *

States Parties shall honour and comply with the request for assistance through proceedings according to their national laws.

States Parties shall give approval for the transportation of the persons to the Court through their territories in accordance with their national laws.]

Article 51

Cooperation and judicial assistance

I. ILC DRAFT

1. States parties shall cooperate with the Court in connection with criminal investigations and proceedings under this Statute.

2. The Registrar may transmit to any State a request for cooperation and judicial assistance with respect to a crime, including, but not limited to:

(a) the identification and location of persons;

(b) the taking of testimony and the production of evidence;

(c) the service of documents;

(d) the arrest or detention of persons; and

(e) any other request which may facilitate the administration of justice, including provisional measures as required.

3. Upon receipt of a request under paragraph 2:

(a) in a case covered by article 21 (1) (a), all States parties;

(b) in any other case, States parties which have accepted the jurisdiction of the Court with respect to the crime in question;

shall respond without undue delay to the request.

II. PROPOSALS

The title of the article should read: "Cooperation and judicial [mutual] assistance".

A. Obligation to provide judicial [mutual] assistance

1. [States Parties shall] [in a case which is not inadmissible under article 35] [afford to the Court the widest possible measures of judicial [mutual] assistance] OR [States have the obligation to provide assistance to the Court] 88/ in connection with any investigations and proceedings under this Statute.

* * *

88/ The success of the Court depends on the effectiveness of the provisions pertaining to cooperation by States with requests for assistance. In this regard the imposition of a definite obligation on States to cooperate, as opposed to a more vague provision allowing a discretion on whether to cooperate, should be considered. The argument for the former option is that a rigid and absolute obligation, allowing for no discretion to States party which accept the jurisdiction of the Court, would be crucial to, and strengthen, the principle of complementarity. Consideration could be given to making the same rigid principles applicable to requests by States with preferent jurisdiction over a crime.

States Parties shall [in a case which is (decided by the Court as) not inadmissible under article 35] cooperate with the Court in connection with criminal investigations and proceedings under this Statute.

* * *

States Parties shall honour and comply with the request for assistance through proceedings according to their national laws.

* * *

The obligation to cooperate provided for in article 60 89/ shall take precedence over all the legal obstacles which the State to which the request for judicial assistance is made invokes against the Court pursuant to its internal law or the treaties to which it is a party.

B. Types/categories of assistance (exhaustive or non-exhaustive) 90/

2. The Registrar, or the Prosecutor [in the performance of his functions under article 26], 91/ may with respect to a crime under article 20 transmit a request in accordance with article 57 92/ to any State Party for cooperation and judicial [mutual] assistance, pertaining to: 93/

* * *

The Court's requests for judicial assistance may concern, without being limited thereto:

(a) The seizure and transmission to the Court of all papers, files or documents, including judicial decisions, extracts from criminal records, and documents of governmental bodies;

(b) The service of procedural documents;

(c) The hearing of witnesses;

89/ Article 60 deals with the general obligation to cooperate with the Court.

90/ Depending on the Court's remedies, is there a need to include assistance relating to compensation or restitution to victims?

91/ See article 26 (2) (e), which empowers the Prosecutor to seek the assistance of States, or article 26 of the ILC draft, which refers to pre-indictment requests. Requests by the Prosecutor after the indictment could also be provided for.

92/ See the note under article 52 in the present compilation. If elements of article 57 of the ILC draft are slotted in as article 52, bringing them into close proximity of these assistance provisions, this reference would change to "article 52".

93/ Paragraph (j) is already a catch-all, obviating the need for "including, but not limited to".

(d) The questioning of any suspect or accused, including those named in a request for transfer;

(e) The production and transmission of any expert opinion or report necessary to the Court.

* * *

Scope of assistance. States Parties shall, in accordance with the provisions of this article, comply with requests for legal assistance by the Court [or Prosecutor] with respect to the investigation or prosecution of a crime under the Court's jurisdiction, which assistance shall include:

(a) the identification and whereabouts of persons or the location of items;

(b) the taking of testimony and the production of evidence;

* * *

the taking and production of [testimony or other] evidence and statements of persons; 94/

(c) the service of documents;

(d) the temporary transfer of persons in custody, with their consent, in order to provide testimony or other assistance to the Court;

(d bis) assisting in the [making available/transfer] of other persons not in custody, in order to provide testimony or other assistance to the Court; 95/

(e) the conduct of on-site investigations and inspections; 96/

(f) permitting the Court to sit on its territory for the purpose of taking of evidence or of conducting a proceeding before the Court;

94/ Other aspects that could be included in this provision are "including records of government" in regard to the production of evidence, and "whether or not under oath" with regard to statements.

95/ The problem of the arrest and forcible transfer of recalcitrant witnesses to the Court creates problems for many States. Provision could be made in the rules of the Court for the Court to accept testimony recorded by the requested State in alternative ways, for instance by way of video recordings (see footnote 106 below). Another alternative would be to allow the Prosecutor/Court to take a deposition from such a witness within the territory of the requested State, provided of course that the defence would also be allowed to cross-examine the witness if the Prosecutor takes the deposition.

96/ See ILC draft Statute article 26 (2) (c). It has been observed that this is also a form of cooperation. This provision as drafted is conceivably wide enough to allow not only the Prosecutor to utilize it, but the Court as well.

(g) executing searches and seizures; 97/

(h) provision of originals and certified copies of relevant records and documents;

(i) taking action as permitted by law to prevent injury to, or the intimidation of, a witness or the destruction of evidence; 98/ or

(j) identifying, tracing, freezing, seizing and forfeiting proceeds and instrumentalities of crime;

(k) any other assistance [not prohibited by the law of the requested State 99/] which the Court may require. 100/

* * *

The Court may request the cooperation and assistance of any State party on matters including, but not limited to:

(a) the extradition of fugitives;

(b) the provisional detention of fugitives;

(c) the taking of statements of suspects, witnesses or any other persons, including testimony upon oath;

(d) search and seizure;

(e) inspections and expert examinations;

(f) the identification and location of suspects, witnesses or any other persons;

(g) the forwarding of evidentiary documents and seizable evidentiary materials;

(h) the approval of transportation of persons surrendered through its territory.

The Court may make a request to States Parties for assistance as provided for in subparagraphs 1 (c) to (g) inclusive of article 1 (hereinafter referred

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97/ This provision appeared as a provisional measure in article 52 (1) (b) of the ILC draft Statute.

98/ These measures also appeared in the ILC draft Statute as provisional measures.

99/ If inserted here, this qualification may only apply to subparagraph (k), and not all the forms of assistance provided for in this article. The aim is, however, to allay concerns States may have regarding the open-endedness of the provision.

100/ Despite the open-endedness created by this subparagraph, it should be considered whether there are any other forms of assistance that need to be specifically provided for.

to as request for assistance) as regards offences specified in article [ ], either ex officio or upon request of the prosecution or a defence counsel.

C. Limitations on obligation; bases for denial of requests; assistance pursuant to conditions (paragraph 5 (c))

3. With regard to a request pertaining to a crime under: 101/

(a) article 20 (a) to (d), all States Parties;

(b) article 20 (e), States Parties which have accepted the jurisdiction of the Court with respect to the crime in question,

shall respond without undue delay to the request.

* * *

3. ... request, without prejudice to the rights under article 26.

* * *

Secrecy of defence

The obligation to cooperate provided for in article 60 shall take precedence over all the legal obstacles which the State to which the request for judicial assistance is made invokes against the Court pursuant to its internal law or the treaties to which it is a party.

1. Any person heard or examined by the Trial Chamber may invoke restrictions provided for in his national law and designed to prevent the divulgation of confidential information connected with national defence.

2. The Trial Chamber may ask the State of which the persons being heard or examined are nationals whether it confirms their claim to be bound to secrecy.

If the State confirms to the Trial Chamber that an obligation of secrecy exists, the Chamber shall note this fact.

3. The provisions of the preceding paragraphs shall also apply to execution of a request for judicial assistance made under article 72.

* * *

When ratifying this Statute, States Parties shall notify the Secretary-General of the United Nations of the conditions under which they would refuse assistance and shall specify elements which must be included in a written

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101/ The final wording of this provision, as well as that of the whole article, depends on which crimes are ultimately included under the jurisdiction of the Court. This drafting reflects a situation where the core crimes are under the inherent jurisdiction of the Court. If treaty crimes are excluded initially and a provision is inserted for the revision of the list of crimes, then a proviso could be considered along with such revision provision, providing for the cooperation by a requested State that has accepted the expanded jurisdiction of the Court with regard to the crime in question.

request. States Parties shall not refuse assistance for reasons other than those indicated.

The following conditions do not constitute conditions under which a requested State may refuse to provide assistance, irrespective of paragraph 3: 102/

(a) when the act constituting the offence for which extradition is requested does not constitute an offence under the laws, regulations or ordinances of the requested State;

(b) when the requested State does not deem it appropriate to honour the request.

All the offences specified in article [ ] shall not be deemed to be offences of a political nature as regards a request for assistance under this Statute.

* * *

5. (a) A requested State Party may deny a request for assistance, in whole or in part, if: 103/

(i) except for [the crime of genocide under article 20 (a)] [the crimes under article 20 (a) to (d)], it has not accepted the jurisdiction of the Court with respect to the offence which is the subject of the investigation or prosecution; or

(ii) [the action requested is prohibited by the law of the requested State] 104/

OR

[the authorities of requested State would be prohibited by its domestic laws from carrying out the action requested with regard to the investigation or prosecution of a similar offence in that State];

102/ It was emphasized that other traditional grounds for refusal, such as the public order clause, should also not be allowed to be invoked with respect to requests of the Court for assistance.

103/ The Preparatory Committee generally felt that the grounds on which the request may be refused should be limited in nature and should be specifically spelt out in the Statute. In this regard non bis in idem could also be considered for inclusion, as well as manifest errors of fact or law by the Court, and a statute of limitations if such a provision is included.

104/ This provision should not allow proliferation of grounds for refusal of a request on the basis of national law. The grounds for denial should remain limited to only those contained in this Statute. This provision is intended to cover the situation where, for instance, telephone tapping is requested and the law of the requested State does not allow such action. Consideration could also be given to formulating the provision in positive terms, for instance that "compliance with a request for assistance shall be in accordance with the national law of the requested State".

(iii) execution of the request would seriously prejudice its security [, ordre public] or other of its essential interests; 105/

(iv) [if the request would be manifestly ungrounded]; or

(v) [if the request is not made in conformity with the provisions of this article.]

(b) [Except where the Court has determined that a case is admissible under section 35, the requested State may postpone or refuse assistance where, in its opinion, execution of the request would interfere with an ongoing investigation or prosecution of the same matter in the requested State or in another State [or with a completed investigation or prosecution of that matter that might have led to an acquittal]]

OR

[A State may deny a request for assistance, in whole or in part, if:

(i) execution would interfere with an ongoing criminal investigation or proceeding in that State; or

(ii) execution would conflict with an obligation to provide assistance to another State in its investigation or prosecution.

(b bis) Assistance may not be denied on the basis of subparagraph (b) (i) or (b) (ii) if the Court has already declared the case giving rise to the request for assistance to be admissible, and

(i) in a case under subparagraph (b) (i), its decision took into consideration the investigation or proceedings pending in the requested State; or

(ii) in a case under subparagraph (b) (ii), the other State is a State Party, and the Court's decision took into consideration the investigation or proceedings in the other State.]

(c) Before denying a request for assistance, the requested State shall consider whether the requested assistance can be provided subject to specified conditions, or whether the assistance can be provided at a later time or in an alternative manner: 106/ Provided that if the Court or the Prosecutor accepts the assistance subject to conditions, it shall abide by them;

105/ The inherent danger of this provision is that it is possible to interpret it so broadly as to be ultimately counterproductive to the obligation to provide assistance. In this regard a proposal has been made to, where a witness refuses to give evidence on the basis of not wishing to disclose government secrets, provide for the Court to approach the State concerned to confirm the status of the information. The Court would then have to abide by the classification of that State.

106/ In this regard it is conceivable that testimony could, for instance, be recorded electronically and made available to the Court in that format. It should be considered whether it is necessary to include a specific provision to the effect that the Court will be allowed to receive and consider such testimony. See footnote 95 above.

(d) If a request for assistance is denied, the requested State Party shall promptly inform the Court or the Prosecutor of the reasons for the denial.

* * *

[A requested State Party may deny a request for assistance, in whole or in part, if compliance with the request would put it in breach of an existing [international law] [treaty] obligation undertaken to another [State] [non-State Party].] 107/

D. Application to the Court to set aside assistance request

4. [A State Party] may, within 28 days of receiving a request under paragraph 2, file a written application with the Registrar [, or with the Prosecutor where the request is made by the Prosecutor during the investigation phase,] requesting that the Court set aside the request on specified grounds. Pending a decision of the Court on the application, the State concerned may delay complying with paragraph 3, but shall take any provisional measure necessary to ensure that assistance can be given at a later moment. 108/

107/ If a breach of another international law obligation is a ground for denying assistance, what is its precise scope?

(a) Is it confined to obligations owed to non-States Parties only? As between States Parties to the International Criminal Court, participation in the Statute could override earlier inconsistent treaty obligations (see article 30 of the 1969 Vienna Convention on the Law of Treaties) but would it be desirable to have an express provision in the Statute stating so?

(b) Is it confined to obligations arising out of treaties only?

(c) Does it cover requests for arrest and transfer (e.g., requests for the surrender of a foreign diplomat accredited to the requested State Party) or only requests for other forms of assistance (e.g., search and seizure of diplomatic premises)?

Consideration should be given to the relationship between the obligations of States Parties to cooperate with the Court and their other existing but inconsistent international law obligations, e.g., arising from bilateral extradition treaties, the Vienna Convention on Diplomatic Relations.

108/ An expressed concern is that this provision could allow States, in bad faith, to block or delay compliance with requests for assistance. It has been pointed out that it is not in accordance with State practice for a State to challenge the decision of another State to request assistance. Does the provision therefore serve a useful purpose in the context of the Court? Two views are that: (a) the provision opens up other grounds for denial of a request, in direct opposition to the intention that the grounds for refusal should be exhaustively enumerated in the Statute; and (b) that the provision is necessary. It allows for a useful interplay between the Court and national jurisdictions in order to allow the latter to better (in view of the principle of complementarity) take an informed decision.

E. Priority of the Court's requests

5. [States Parties and the Court shall give absolute priority to the request under paragraph 1 of this article even over concurring requests from other States [Parties] not having primary jurisdiction according to this Statute. 109/

F. Confidentiality

6. The Court shall ensure the confidentiality of evidence and information except as required for the investigation and proceedings described in the request.

The requested State shall keep confidential a request and any supporting documents, except to the extent that the disclosure is necessary for execution of the request.

* * *

The requested State may, when it deems it to be in its interest, transmit documents, papers, files or information to the Prosecutor on a confidential basis. The Prosecutor may then use them only for the purpose of collecting new evidence.

The State may automatically or at the request of the Prosecutor subsequently authorize the publication of such documents, papers, files or information. They may then be used as evidence, provided that they are previously communicated to the accused.

G. Reciprocal cooperation of the Court with States Parties

7. If requested, the Court shall reciprocally cooperate with and 110/ provide assistance to a State Party conducting an investigation into actions which constitute a crime under this Statute.

* * *

1. The States parties may, for the purposes of a current investigation or legal proceeding, request the Court to transmit papers or documents obtained in the course of an investigation or a legal proceeding conducted by the Court.

2. If such papers or documents have been obtained with the assistance of a State, this State must give its prior consent to any communication addressed to the requesting State. It shall be invited, at the request of the Preliminary Investigations Chamber and through the Registrar, to make its decision known.

3. In the case of the testimony of a witness or expert, such witness or expert must also give his prior consent to any communication addressed to the

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109/ If the option, expressed in paragraph 3, is found to be undesirable in view of arguments related to the principle of complementarity, this alternative, reflecting a reciprocal and rigid obligation approach, could be considered.

110/ Some support exists for providing a reciprocal obligation on the Court also to provide assistance to States.

requesting State. He shall be invited to do so at the request of the Preliminary Investigations Chamber and through the Registrar.

4. The Preliminary Investigations Chamber shall grant the request after having obtained the necessary consents.

The Preliminary Investigations Chamber may, under the same conditions, grant such a request from a State non-party. In taking its decision it shall bear in mind the behaviour of that State in connection with earlier requests for cooperation addressed to it by the Court and the interests of justice.

Article 52

Provisional measures

I. ILC DRAFT

1. In case of need, the Court may request a State to take necessary provisional measures, including the following:

(a) to provisionally arrest a suspect;

(b) to seize documents or other evidence; or

(c) to prevent injury to or the intimidation of a witness or the destruction of evidence.

2. The Court shall follow up a request under paragraph 1 by providing, as soon as possible and in any case within 28 days, a formal request for assistance complying with article 57.

II. PROPOSALS

The title of the article should read:

[Provisional measures] [Request for assistance in case of urgency]

[*Note*. In view of the proposal at the first session of the Preparatory Committee that provisional arrest be included under the provisions of articles 28 and 29 (as pre-indictment arrest and post-indictment arrest) this provision as contained in the ILC draft Statute could be deleted. [111] The provisional measures pertaining to protection of evidence and witnesses can be seen as assistance measures and have been inserted under article 51 (2).

If this is done, the current ILC draft Statute's article 57 pertaining to the form and contents of the request could be inserted here as article 52, bringing it in closer proximity to article 51 to which it applies.

The question of provisional detention is dealt with in article 53 *bis*. The question of provisional arrest in case of urgency is dealt with in article 53 *ter*.]

In cases of urgency, when the Court makes a request for provisional detention, notifying the requested Party that a warrant of arrest has been issued or a sentence has been imposed for an offence specified in article [ ], the requested State Party may provisionally detain the person sought in accordance with its national laws.

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[111] It should be noted, however, that other provisional measures, such as for instance deprivation of freedom through the seizure of passports, may indeed exist that may warrant the retention of this provision if these measures cannot be read in under the catch all provision of article 51 (2) (i).

The request for provisional detention shall describe the identity of the person to be sought and the facts of the case, and shall contain such further information as may be required by the laws of the requested State.

If the Court fails to present the request for extradition within [30] days from the date of provisional detention, the person detained shall be set at liberty; provided that this stipulation shall not prevent the requested State from instituting a proceeding with a view to extraditing the person sought if a request for extradition is subsequently received.

When ratifying this Statute, States Parties shall notify the Secretary-General of the United Nations of the conditions under which they would refuse provisional detention and shall specify elements which must be included in a written request for provisional detention. States Parties shall not refuse a request for detention for reasons other than those indicated.

* * *

In an emergency the request for transfer referred to in paragraph 1 of this article may be transmitted to a State by any means producing a written communication. It shall be accompanied by a statement of the facts and shall indicate the existence of one of the warrants referred to in paragraph 4 of this article.

The person named in a request for transfer transmitted in this way may be arrested and placed in detention in the manner prescribed for the execution of the warrant mentioned in the said request. This person shall be released automatically if the request for transfer accompanied by the documents referred to in paragraphs 3 and 4 of this article does not reach the State which is detaining him within 30 days from the date of his arrest. However, the person may consent to his transfer to the Court before the expiry of this period if the legislation of the requested State so allows, in which case that State shall proceed to transfer him to the Court as soon as possible.

The release of this person pursuant to the preceding paragraph shall not prevent his re-arrest and transfer to the Court if a request for transfer satisfying the requirements of paragraphs 3 and 4 of this article arrives subsequently.

* * *

In an emergency, the request referred to in paragraph 1 of this article may be transmitted to a State by any means producing a written communication.

At the request of the Court, the documents produced in response to the request shall also be sent urgently by any means. The procedure described in paragraphs 2 and 3 of this article shall subsequently be followed.

Article 53

Transfer of an accused to the Court

I. ILC DRAFT

1. The Registrar shall transmit to any State on the territory of which the accused may be found a warrant for the arrest and transfer of an accused issued under article 28, and shall request the cooperation of that State in the arrest and transfer of the accused.

2. Upon receipt of a request under paragraph 1:

(a) all States Parties:

(i) in a case covered by article 21 (1) (a), or

(ii) which have accepted the jurisdiction of the Court with respect to the crime in question;

shall, subject to paragraphs 5 and 6, take immediate steps to arrest and transfer the accused to the Court;

(b) in the case of a crime to which article 20 (e) applies, a State Party which is a Party to the treaty in question but which has not accepted the Court's jurisdiction with respect to that crime shall, if it decides not to transfer the accused to the Court, forthwith take all necessary steps to extradite the accused to a requesting State or refer the case to its competent authorities for the purpose of prosecution;

(c) in any other case, a State Party shall consider whether it can, in accordance with its legal procedures, take steps to arrest and transfer the accused to the Court, or whether it should take steps to extradite the accused to a requesting State or refer the case to its competent authorities for the purpose of prosecution.

3. The transfer of an accused to the Court constitutes, as between States Parties which accept the jurisdiction of the Court with respect to the crime, sufficient compliance with a provision of any treaty requiring that a suspect be extradited or the case referred to the competent authorities of the requested State for the purpose of prosecution.

4. A State party which accepts the jurisdiction of the Court with respect to the crime shall, as far as possible, give priority to a request under paragraph 1 over requests for extradition from other States.

5. A State Party may delay complying with paragraph 2 if the accused is in its custody or control and is being proceeded against for a serious crime, or serving a sentence imposed by a court for a crime. It shall within 45 days of receiving the request inform the Registrar of the reasons for the delay. In such cases, the requested State:

(a) may agree to the temporary transfer of the accused for the purpose of standing trial under this Statute; or

(c) shall comply with paragraph 2 after the prosecution has been completed or abandoned or the sentence has been served, as the case may be.

6. A State party may, within 45 days of receiving a request under paragraph 1, file a written application with the Registrar requesting the Court to set aside the request on specified grounds. Pending a decision of the Court on the application, the State concerned may delay complying with paragraph 2 but shall take any provisional measures necessary to ensure that the accused remains in its custody or control.

II. PROPOSALS

The title of the article should read:

Surrender of accused or convicted persons to the Court 112/

The Court may request the extradition of a fugitive to States Parties as regards offences specified in article [ ] when the Court has issued a warrant of arrest.

* * *

A. Transmittal and purposes of request

1. The Registrar shall transmit to any State on the territory of which the accused or convicted person may be found the warrant for the arrest and [a request for the] transfer [surrender] of such person issued under article 28, or in order to enforce the sentence of the convicted person, [along with the supporting material outlined in article 53 bis] and shall request the cooperation of that State in the arrest and surrender of such person. 113/

* * *

The request for transfer, in written form and signed by the Prosecutor, shall be addressed by the Registrar to the competent authority of the requested State designated in accordance with article 62. 114/

112/ This article will require especial consideration of the principle of complementarity, and specific drafting to reinforce the principle may be necessary. It is conceivable that convicted persons may be at large for some reason. It may therefor be necessary to provide for the arrest of such convicted persons. Although this aspect is dealt with under this article, it has been pointed out that it may be more appropriate to deal with this aspect under article 59 on enforcement of sentences.

113/ See article 53 (4) of both the ILC and the Siracusa drafts.

114/ Article 62 deals with the designation of a competent national authority.

States parties shall respond without delay to any request for cooperation submitted by the Court under this Statute. They may request the Court to provide any additional information which they consider necessary to enable them to respond to the request.

The competent authority of the requested State and the Registrar of the Court shall agree on the date and modalities of the transfer of the person concerned to the seat of the Court or to the place which it specifies.

* * *

The request under paragraph 1 shall be made in written form through diplomatic channels. If a requested State considers the information and evidence provided by the Court insufficient as a basis for decisions whether to offer assistance, it may seek further information and evidence from the Court as it deems necessary.

All the documents to be provided by the Court to the State Party shall be accompanied by a duly certified translation in the language of the party.

B. Limitations on obligation/Basis for denial 115/

2. A requested State Party on whose territory the accused or convicted person is found 116/ shall, subject to paragraphs 8 and 9, take immediate steps to arrest and surrender a convicted person to the authorities identified in the warrant of arrest in the case of a convicted person, 117/ or arrest and surrender an accused to the Court if the case is covered by:

(a) articles 20 (a) to (d) [(a) or Article 23 (1)]; 118/ or

(b) if the requested State has accepted the jurisdiction of the Court with respect to the crime in question.

* * *

115/ The refusal to transfer on the grounds that a State exercises its jurisdiction is neither a denial nor a limitation on the obligation to transfer but a question of complementarity to be addressed in the appropriate section of the draft Statute.

116/ Apart from stating the obvious fact that, since the request will in all probability be transmitted to more than one State, the State on whose territory the person is found should arrest and surrender that person, the text basically accords with article 53 (2) of the Siracusa draft. See, however, article 53 (2) of the ILC draft.

117/ It is conceivable that a convicted fugitive should be surrendered to the authorities of the State which has been designated as the administering State, and that warrant would provide for this.

118/ The first option would apply if the Court was given inherent jurisdiction over the core crimes.

The extradition legislation of a requested State shall be opposable by that State to any request for transfer of the accused or the suspect to the Court.

* * *

When ratifying this Statute, States parties shall inform the Secretary-General of the United Nations of the conditions under which they would refuse extradition and shall specify elements which must be included in a written request for extradition. States Parties shall not refuse extradition for reasons other than those indicated.

The following do not constitute conditions under which a requested State may refuse extradition, irrespective of paragraph 4:

(a) The act constituting the offence for which extradition is requested does not constitute an offence under the laws, regulations or ordinances of the requested State;

(b) The requested State does not deem it appropriate to honour the request;

[(c) The requested State has substantial grounds for believing that the request for extradition has been made for the purpose of prosecuting or punishing the person concerned on account of that person's race, religion, nationality, ethnic origin, political opinions, sex or status, or that that person's position may be prejudiced for any of those reasons;]

[(d) The requested State has grounds for believing that the person whose extradition is requested has been or would be subjected in the Court to torture or cruel, inhuman or degrading treatment or punishment or if that person has not received or would not receive the minimum guarantees in a criminal proceeding, as contained in the International Covenant on Civil and Political Rights, article 14.]

All the offences specified in article [ ] shall not be deemed to be offences of a political nature as regards extradition under this Statute.

States Parties shall not be bound to extradite their own nationals, but may extradite them at their discretion.

* * *

Where the law of the requested State Party so requires, the accused person shall be entitled to challenge the request for arrest and surrender in the court of the requested State Party on the ground that the evidence submitted in support of the request would not be sufficient to commit him to trial for such an offence in a court of the requested State.

* * *

[A requested State Party may deny a request for arrest or surrender if compliance with the request would put it in breach of an existing [international law] [treaty] obligation undertaken to another [State] [non-State party].] 119/

C. Competing [parallel] requests from the Court and State(s)

3. The requested State Party, if it is a party to the treaty covered by article 20 (e) and has accepted the jurisdiction of the Court, shall give priority to surrender the accused to the Court over requests for extradition from other States.

* * *

[3. If the requested State also receives a request from a State for the extradition of the same person, either for the same offence or for a different offence for which the Court is seeking the person's surrender, the appropriate authority of the requested State shall determine whether to surrender the person to the Court or to extradite the person to the State. In making its decision the requested State shall consider all relevant factors, including but not limited to

(a) whether the extradition request was made pursuant to a treaty;

(b) if the offences are different, the nature and gravity of the offences;

(c) the interests of the State requesting extradition, including, where relevant, whether the offence was committed in its territory and the nationality of the victims of the offence;

(d) the possibility of subsequent surrender or extradition between the Court and the State requesting extradition; and

(e) the chronological order in which the requests were received.

3 bis. The requested State may not, however, deny a request for the surrender made under this article in deference to another State's request for extradition of the same person for the same offence, if the State requesting extradition is a State party, and the Court has ruled the case before it admissible, and its decision took into consideration the proceedings in that State which gave rise to its extradition request.] 120/

* * *

1. The States Parties shall undertake to give priority to requests for transfer submitted by the Court over requests for extradition submitted by other States Parties.

119/ Consideration should be given to the relationship between the obligations of States Parties to cooperate with the Court and their other existing but inconsistent international law obligations, e.g. arising from bilateral extradition treaties, the 1961 Vienna Convention on Diplomatic Relations, etc. See footnote 107 above.

120/ This issue may be considered as part of the wider question of whether a State Party can rely on an existing but inconsistent international law obligation to deny such a request. See footnote 107.

2. If the State Party to which the request for transfer is addressed has also received a request for extradition from a State Party to which it is bound by an extradition agreement, it shall rule on that request for extradition, unless the Court, pursuant to article 39, has already rejected the challenge to submission to the Court made by the State requesting the extradition.

3. The State requesting the extradition may, if it has not already contested submission to the Court pursuant to article 39, request the Court to withdraw its request for transfer, on the basis of the principle of complementarity stated in the preamble to this Statute. The person named in the request for transfer may, under the same conditions, challenge submission to the Court and seek the withdrawal of the request for transfer.

Taking into account the facts and the identity of the persons named in the request for transfer, the Court shall rule in accordance with article 35, paragraphs (a) and (c), and article 39, paragraphs 3, 5, 6 and 7. The warrants issued earlier by the Court shall remain in force and the States parties shall be bound to cooperate.

4. If the State detaining the person concerned rejects the request for extradition, it shall so inform the Court without delay. The request referred to in paragraph 3 of this article shall then cease to have effect, and the Court shall note this fact in a decision.

5. If the Court decides not to grant the request submitted under paragraph 3 of this article, the Registrar shall immediately so inform the requested State, and the demand for extradition submitted by the requesting State shall cease to have effect. The person concerned shall then be transferred to the Court as soon as possible.

6. If the State detaining the person concerned decides to grant the request for extradition before the Court has finally ruled on the request submitted under paragraph 3 of this article, it may either keep the person concerned at its disposal or transfer him to the Court, in which case it shall notify its decision in favour of extradition to the requesting State and to the Court.

If the Court subsequently accepts the request submitted by the requesting State in accordance with paragraph 3 of this article and if the person concerned has been transferred to it pursuant to the preceding paragraph, it shall order the return of the person concerned to that State.

For the purposes of prosecution the requesting State shall be bound by the decision on extradition taken by the requested State and by all other provisions of the extradition treaty between the two States. The duration of the person's detention in the requested State and at the seat of the Court or in the place which it specifies shall be deducted in full from any sentence imposed in that requesting State.

7. If the State Party requested to make a transfer to the Court has also received a request for extradition from a State non-party but one to which it is bound by an extradition agreement, it shall rule as in the case of concurrent requests for extradition, taking into account the following circumstances:

- The respective dates of the requests;
- The respective seriousness of the offences in question, with priority given to the request based on the most serious offences;

- The possibility that an agreement may be concluded between the State non-party requesting the extradition and the Court providing either that, following his trial by that State or after he has served his sentence, the person concerned may be transferred to the Court, or that the Court agrees to return him temporarily to the State requesting his extradition after having tried him, in order that that State may try him in turn or have him serve his sentence.

D. Extradite or prosecute obligation

4. In the case of a crime to which article 20 (e) applies, the requested State Party, if it is a party to the treaty in question but has not accepted the Court's jurisdiction with respect to that crime shall, where it decides not to surrender the accused to the Court, promptly take all necessary steps to extradite the accused to a State having requested extradition or refer the case to its competent authorities for the purpose of prosecution. 121/

* * *

If the requested State refuses to carry out a transfer, it shall, at the request of the Court, submit the case to the competent authorities in order that judicial proceedings may be instituted if grounds exist.

* * *

If a State Party decides not to extradite a fugitive who is present in its territory, it shall submit, without undue delay, the case to its competent authority for the purpose of prosecution, through proceedings in accordance with its national laws. This provision shall not apply in the following cases:

(a) if it is deemed that under the laws, regulations or ordinances of the requested State it would be impossible to impose or to execute punishment upon the fugitive; if the act constituting the offence for which extradition is requested was committed in the territory of the requested State; or if the trial therefore would be held in a court of requested State;

(b) if there is no probable cause to suspect that the fugitive has committed an act which constitutes an offence for which extradition is requested.

5. In any other case, the requested State Party shall [consider whether it can], 122/ in accordance with its legal procedures, take steps to arrest and surrender the accused to the Court, or [whether it should] take steps to extradite the accused to a State having requested extradition or refer the case to its competent authorities for the purpose of prosecution. 123/

121/ It is conceivable that a convicted fugitive should be surrendered to the authorities of the State which has been designated as the administering State, and that the warrant would provide for this.

122/ Should there be a discretion in this regard? If not, then both the phrases in square brackets in this provision could be deleted.

123/ See ILC draft article 53 (2) (c) and Siracusa draft article 53 (5).

5 bis. A requested State Party may not deny a request for surrender on the grounds that

(a) the person sought is a national of the requested State;

(b) the offence for which the person is being sought is a political or military offence [or an offence connected to such offences]; 124/ or

* * *

5 ter. A requested State may deny a request for surrender if the person is being proceeded against or has been proceeded against, convicted or acquitted in the requested State or another State for the offence for which his surrender is sought, unless the Court has declared the case before it to be admissible under article 35 or 42, notwithstanding such proceedings or such prior conviction or acquittal.

6. The surrender of an accused to the Court constitutes, as between States Parties which accept the jurisdiction of the Court with respect to the crime in question, compliance with a provision of any treaty requiring that a suspect be extradited or the case be referred to the competent authorities of the requested State for the purpose of prosecution. 125/

7. A State Party which has accepted the jurisdiction of the Court with respect to the crime in question shall, as far as possible, give priority to a request under paragraph 1 over requests for extradition from other States. 126/

E. Delayed or temporary surrender of persons in custody for different offence

8. The requested 127/ State Party may delay complying with a request under paragraphs 2 to 4 if the accused or convicted person is in its custody or control and is being proceeded against for a serious crime, or serving a

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124/ The separation of provisions dealing with mutual assistance and with arrest and transfer necessitates the insertion in this article of a provision dealing with the grounds on which the request for arrest and surrender may be refused. Further grounds such as double criminality and public order should also be inserted.

125/ This specific language of such a provision would need to reflect whether, in the final analysis, such situations are governed as matters of admissibility, under a separate non bis in idem provision, or a combination of the two. The notion here is to preserve the traditional non bis in idem concept, save where the Court, in accordance with the Statute, has specifically ruled that the exercise of its jurisdiction over the case is proper notwithstanding the prior proceedings in a State.

126/ See Siracusa draft article 53 (7) and ILC draft article 53 (4).

127/ Siracusa draft article 53 (8). If "requested" is retained here, it should also be inserted at the beginning of the next paragraph for the sake of uniformity. It would, however, appear to be redundant owing to the specific reference to "request" in both provisions and could therefore be deleted.

sentence imposed by [a/the] 128/ Court for a crime. It shall within [28 days] of receiving the request inform the Registrar of the reasons for the delay. In such case it:

(a) may agree to the temporary surrender of the accused for the purpose of standing trial under this Statute; or

(b) shall comply with the request under paragraphs 2 to 4 after the prosecution has been completed or abandoned or the sentence has been served, as the case may be. 129/

* * *

The requested State may, with the consent of the Preliminary Investigations Chamber, which shall rule after having heard the Prosecutor, defer the transfer of the person in question if he is being prosecuted or serving a sentence in respect of facts different from those for which he is being sought.

If the requested State does not request deferment of the transfer or if such deferment is denied by the Preliminary Investigations Chamber, that State may request the Preliminary Investigations Chamber to return the person concerned after completion of his trial by the Court, in order that he may be prosecuted or serve his sentence in respect of facts different from those for which he has finally been sentenced by the Court.

* * *

F. Application to the Court to set aside surrender request

9. A [requested] State Party may, within [28 days] of receiving a request under paragraph 1, file a written request with the Registrar requesting the Court to set aside the request on specified grounds including those mentioned in articles 35 and 42. Pending a decision of the Court on the application, the State concerned may delay complying with paragraphs 2 to 4 but shall take any provisional measures necessary to ensure that the accused or convicted person remains in its custody or control. 130/

G. Provisions of evidence irrespective of surrender

10. To the extent permitted under the law of the requested State and subject to the rights of third parties, all [property] found in the requested State that has been acquired as a result of the alleged offence or that may be required as evidence shall, upon request, be transmitted to the Court if surrender is granted, even if the surrender cannot be carried out, on conditions to be determined by the Court. 131/

128/ Article 53 (8) of the Siracusa draft contains an error here: either "a" or "the" depending on whether any court, or specifically the International Criminal Court is being referred to.

129/ See Siracusa draft article 53 (8).

130/ See ILC draft article 53 (6) and Siracusa draft article 53 (9).

131/ Siracusa draft article 53 (10). Some delegations questioned the utility of this paragraph.

H. Transit of surrendered person

11. 132/ (a) A State Party shall authorize transportation through its territory of a person being surrendered to the Court by another State. A request by the Court for transit shall be transmitted through diplomatic channels, unless otherwise agreed. The request for transit shall contain a description of the person being transported and a brief statement of the facts of the case. A person in transit shall be detained in custody during the period of transit.

(b) No authorization is required where air transportation is used and no landing is scheduled on the territory of the State of transit. If an unscheduled landing occurs on the territory of the State of transit, it may require a request for transit as provided for in subparagraph (a). The State of transit shall detain the person to be transported until the request for transit is received and the transit is effected, so long as the request is received within 96 hours of the unscheduled landing.

* * *

1. Transit through the territory of one of the States Parties shall be granted on application to the competent authority designated in accordance with article 62.

2. The transit of a national of the transit State may be refused.

3. Subject to the provisions of paragraph 4 of this article, the documents referred to in article 66, paragraphs 3 (a) and 4 (a) and (b), shall be produced.

4. If air transport is used, the following provisions shall apply:

(a) when no intermediate landing is envisaged, the Court shall notify the State over whose territory the aircraft will fly and certify the existence of one of the documents referred to in article 66, paragraph 4;

(b) in the event of an unscheduled landing or when a landing is envisaged, the Court shall submit a regular transit request as provided for in paragraph 3 of this article.

5. The transit of the person concerned shall not be effected through a territory where there are grounds for believing that his life or liberty may be threatened by reason of his race, religion, nationality or political opinions.

* * *

States Parties shall give approval for the transportation of the persons to the Court through their territories in accordance with their national laws.

132/ The need for a transit provision has been identified. It is suggested that this provision should form a separate article.

Article 53 bis 133/

Form and content of requests for arrest or surrender

1. A request for arrest or surrender [duly signed by the Prosecutor] shall:

(a) be made by letter, fax, e-mail or any medium capable of delivering a written record (provided that a request shall be confirmed through the diplomatic channel):

(b) contain or be supported by:

(i) information describing the person sought, sufficient to identify the person and information as to that person's probable location;

(ii) in the case of a request for pre-indictment arrest:

a. a copy of the warrant for arrest;

b. a statement of the reasons to believe the suspect may have committed a crime within the jurisdiction of the Court and that the Prosecutor expects to seek an indictment within (90) days;

c. a brief summary of the facts of the case;

d. a statement as to why pre-indictment arrest is urgent and necessary.

(iii) in the case of a request for post-indictment arrest and surrender of a person not yet convicted:

a. a copy of the warrant of arrest and indictment;

b. such information, documents or statements outlining the facts of the case as may be required by the law of the Requested State.

(iv) in the case of a request for the arrest and surrender of a person already convicted:

a. a copy of any warrant of arrest for that person;

b. a copy of the judgement of conviction;

c. information to demonstrate that the person sought is the person referred to in the judgement of conviction;

d. (if the person sought has been sentenced) a copy of the sentence imposed and a statement of any time already served and that remaining.

2. Where the requested State Party considers the information provided insufficient to allow it to comply with the request it may seek, without delay, additional information.

* * *

133/ This article has no equivalent in the draft proposed by the International Law Commission.

Article 53 ter [134]

Provisional arrest

1. In case of urgency, the Court may request the provisional arrest of the person sought pending presentation of the request for surrender and supporting documents under paragraph 53 bis.

2. The request for provisional arrest shall contain:

(a) a description of the person sought and information regarding the probable location of such person;

(b) a brief statement of the essential facts of the case, including, if possible, the time and location of the offence;

(c) a statement of the existence of a warrant of arrest or a judgement of conviction against the person sought, and a description of the specific offence or offences with which the person has been charged or for which he has been convicted; and

(d) a statement that a request for surrender of the person sought will follow.

3. A person who is provisionally arrested may be discharged from custody upon the expiration of [60] days from the date of provisional arrest if the Requested State has not received the formal request for surrender and the supporting documents specified under paragraph [ ].

4. The fact that the person sought has been discharged from custody pursuant to paragraph 3 shall not prejudice the subsequent rearrest and surrender of that person if the request for surrender and supporting documents are delivered at a later date.

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[134] This article has no equivalent in the draft prepared by the International Law Commission.

Article 54

Obligation to extradite or prosecute

I. ILC DRAFT

In a case of a crime referred to in article 20 (e), a custodial State party to this Statute which is a party to the treaty in question but which has not accepted the Court's jurisdiction with respect to the crime for the purposes of article 21 (1) (b) (i) shall either take all necessary steps to extradite the suspect to a requesting State for the purpose of prosecution or refer the case to its competent authorities for that purpose.

II. PROPOSALS

[Note. Owing to the insertion of article 53 (4), (5) and (6), the need for article 54 of the ILC draft falls away. The provisions of the proposed article 54 (Judicial assistance) of the Siracusa draft have been absorbed into article 51 and therefore do not require incorporation as a separate article. 135/]

135/ This provision has a tight connection with the item under article 59 dealing with the recognition of the Court's sentences.

Article 55

Rule of speciality

I. ILC DRAFT

1. A person transferred to the Court under article 53 shall not be subject to prosecution or punishment for any crime other than that for which the person was transferred.

2. Evidence provided under this Part shall not, if the State when providing it so requests, be used as evidence for any purpose other than that for which it was provided, unless this is necessary to preserve the right of an accused under article 41 (2).

3. The Court may request the State concerned to waive the requirements of paragraphs 1 or 2, for the reasons and purposes specified in the request.

II. PROPOSALS

A. Limit on other proceedings against surrendered person

1. A person surrendered to the Court under Article 53 shall not be proceeded against, sentenced or detained for any crime other than that for which the person has been surrendered. 136/

* * *

1. A person extradited under this Statute shall not, except under any one of the following circumstances, be detained, prosecuted, tried or punished for an offence other than that for which extradition was effected:

(a) when a person extradited commits an offence after extradition;

(b) when a requested State has consented to his detention, prosecution, trial or punishment for an offence other than that for which the extradition has been effected.

B. Limit on other uses of evidence

2. A State providing evidence under this Part may require that the evidence not be used for any purpose other than that for which it was provided unless

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136/ See article 55 (1) of both the ILC draft and the Siracusa draft. This wording is based on the more comprehensive formulation of the Siracusa draft.

this is necessary to preserve a right of the accused under article 41 (2). 137/

* * *

2. Evidence provided by States Parties under this Statute shall not be used in connection with any offence other than that which is mentioned in the request for assistance as being a subject of investigation unless the requested State offers its consent.

C. Waiver of rule by requested State

3. The Court may request the State concerned to waive the requirements of paragraphs 1 or 2, for the reasons and purposes to be specified in the request. In a case of paragraph 1, the request shall be accompanied by an additional warrant of arrest and by a legal record of any statement made by the accused with respect to the offence.

137/ The Preparatory Committee expressed general satisfaction with the limited rule contained in article 55 (2) of the ILC draft. The proposed wording reflects the wording of article 55 (2) of the Siracusa draft.

Article 56

Cooperation with States not parties to this Statute

I. ILC DRAFT

States not parties to this Statute may assist in relation to the matters referred to in this Part on the basis of comity, a unilateral declaration, an ad hoc arrangement or other agreement with the Court.

II. PROPOSALS

[Note. This provision has been inserted as subparagraph 4 of the proposed article X of this Part, obviating the need for its inclusion as a separate article.]

Certain delegations suggested that there should be a separate provision for cooperation with non-State Parties.

Article 57

Communications and documentation

I. ILC DRAFT

1. Requests under this Part shall be in writing, or be forthwith reduced to writing, and shall be between the competent national authority and the Registrar. States parties shall inform the Registrar of the name and address of their national authority for this purpose.

2. When appropriate, communications may also be made through the International Criminal Police Organization.

3. A request under this Part shall include the following, as applicable:

(a) a brief statement of the purpose of the request and of the assistance sought, including the legal basis and grounds for the request;

(b) information concerning the person who is the subject of the request on the evidence sought, in sufficient detail to enable identification;

(c) a brief description of the essential facts underlying the request; and

(d) information concerning the complaint or charge to which the request relates and of the basis for the Court's jurisdiction.

4. A requested State which considers the information provided insufficient to enable the request to be complied with may seek further particulars.

II. PROPOSALS

The title of the article should be changed to read:

Form and contents of the request 138/ [for assistance] 139/

1. Requests for judicial (mutual) assistance shall: 140/

A. Assistance

The request for judicial assistance, in written form and signed by the Prosecutor, shall be addressed by the Registrar to the competent authority of the requested State designated in accordance with article 62.

The request referred to in paragraph 1 of this article shall be accompanied by the following information:

(a) A statement of the facts in respect of which the request for judicial assistance is made, the date and place of their commission and their legal characterization in accordance with articles 27 to 32;

(b) The identity, and if possible, the address of any person named in the request;

(c) The fullest possible details of the requested assistance.

The documents produced in response to the request for judicial assistance shall be addressed by States to the Registrar of the Court.

The Court may request the transmission of the original copies of these documents or of any other documents. In such cases the requested State may, with the consent of the Preliminary Investigations Chamber, defer the dispatch of these documents for as long as is necessary for the conduct of an investigation or legal proceeding in its territory. If the original copies of the documents are transmitted to the Court, they shall be returned as soon as possible to the State which transmitted them, if that State so requests.

138/ The deletion of article 52 has been proposed so that the matters previously dealt with as "provisional measures" may be dealt with in articles 28 and 29 as pre-indictment and post indictment arrest. The present article could then be inserted as article 52. If this is done it may be necessary to let the provisions inserted as article 52 deal with the form and content for requests for mutual assistance. A separate provision would then need to be inserted after article 53 to deal with the form and content of a request for arrest and surrender of persons.

139/ In this report article 57 embodies only those proposals that bear on the form that requests for judicial assistance should take and not requests for transfer.

140/ Siracusa draft article 57 (1), elaborates on ILC draft article 57 (1) and (2). The Preparatory Committee was generally satisfied with the ILC draft but indicated that article 57 (3) and (4) could be further refined.

If the Court does not make any request under the preceding paragraph, the requested State may transmit merely certified copies or photocopies of the documents.

B. Transfer

The request for transfer, accompanied by the documents specified in paragraphs 3 and 4 of this article, may also be addressed to all the States Parties in whose territory the suspect or accused may be found, as well as to all the States non-parties willing to comply with the request.

In all cases the request for transfer shall be accompanied by:

(a) A statement of the facts in respect of which the transfer is requested, the date and place of their commission and their legal characterization in accordance with articles 27 to 32;

(b) The fullest possible description of the suspect or accused and any other information which may help to determine his identity;

(c) If possible, the place where the suspect or accused may be found.

The request for transfer shall also be accompanied by:

(a) Either the warrant for arrest and transfer, together with the indictment, in an original copy or a copy certified by the Registrar, if the request for transfer is made after the filing of the indictment;

(b) Either the warrant for arrest and detention, in the original copy or a copy certified by the Registrar, if the request for transfer is made before the filing of the indictment, article 58, paragraph 2, being then applicable.

* * *

(a) be made by letter, fax, e-mail or any medium capable of delivering a written record[, provided that a request shall be confirmed through the diplomatic channel];

(b) contain the following, as applicable:

(i) a brief statement of the purpose of the request and the assistance sought including the legal basis [and grounds] for the request;

(ii) as much detailed information as possible about the location or identification of any person or place that must be found or identified in order for the assistance sought to be provided; 141/

(iii) a brief description of the [essential] facts underlying the request including a statement explaining the nexus between the assistance sought and the matter under investigation or subject to prosecution;

141/ At the Preparatory Committee it was proposed that the "identity and location of witnesses" should also be included in this list. This provision appears to be wide enough to encompass witnesses as well.

(iv) information 142/ concerning the complaint or charge to which the request relates and of the basis of the Court's jurisdiction;

(v) such information as may be required under the law of the requested State in order to execute the request;

(vi) any other information relevant to the assistance being sought; 143/ and

The request for extradition shall include a description of the identity of the fugitive and the facts of the case, and shall contain such further information as may be required by the laws of the requested State.

* * *

The request for provisional detention shall describe the identity of the person to be sought and the facts of the case, and shall contain such further information as may be required by the laws of the requested State.

(c) where applicable and unless otherwise agreed, as soon as practicable be provided to a requested State in the form of a duly certified translation in the official language of that State. 144/

2. Communications relating to a request under this Part shall be between the Registrar, or Prosecutor acting under article 26, and the national authority designated by each State Party for this purpose, 145/ and where appropriate may be made through the International Criminal Police Organization. 146/

Transmittal of Requests. Requests for cooperation may be made by the Court [or Prosecutor], and shall be transmitted through diplomatic channels, unless the Court and the requested State agree on another mode for transmitting requests.

* * *

142/ "Information" includes the charge and any relevant evidence.

143/ This catch-all provision derives from a proposal during the discussions of the Preparatory Committee.

144/ To provide for such translations would conceivably facilitate the procedures to be followed in the requested State. The provision as drafted provides for later transmission of the translation. This could avoid delays in urgent situations where the immediate preparation in a specific language could take time.

145/ Siracusa draft article 57 (1), with the added provision for requests by the prosecutor during the investigative phase. ILC draft article 57 (1) refers only to "between the competent national authority and the Registrar". The Preparatory Committee had some divergence of views on this aspect. The proposed wording is intended to be a compromise that could accommodate all views.

146/ ILC draft article 57 (2), Siracusa draft article 57 (1) (2). This provision has, in this draft, been linked to the provision contained in paragraph 1 of both the ILC and the Siracusa drafts.

The request under paragraph 1 shall be made in written form through diplomatic channels. If a requested State considers the information and evidence provided by the Court insufficient as a basis for decisions whether to offer assistance, it may seek further information and evidence from the Court as it deems necessary.

All the documents to be provided by the Court to a State Party shall be accompanied by a duly certified translation in the language of the Party.

* * *

3. Where the requested State Party considers the information provided insufficient to allow it to comply with the request it may seek, without delay, additional information. 147/

4. Provided that the request contains sufficient information to meet the requirements of the relevant law of the administering party, the latter shall execute the request as expeditiously as possible and transmit the results to the requesting party. 148/

* * *

(a) The requested State shall promptly execute the request and transmit the result to the Court [or Prosecutor];

(b) The requested State shall, to the extent permitted by its law, execute the request in accordance with any procedures specified in the request and permit persons specified in the request to be present at or assist in execution of the request.

Article 57 bis

Execution of requests 149/

1. Requests for assistance shall be executed as expeditiously as possible and the results transmitted to the requesting party.

2. Requests for assistance shall be executed in accordance with the law of the requested State except that the requested State shall execute the request in the manner specified in the request, including following any procedures outlined therein or permitting persons specified in the request to be present at and assist in the execution process; unless prohibited by the law of that State.

3. The ordinary costs for execution of requests shall be borne by the requested State except for the following which should be borne by the requesting party:

147/ Siracusa draft article 57 (2), which elaborates on ILC draft article 57 (4).

148/ This provision is drafted in reciprocal terms to allow for the Court to be subject to the same obligation if requested to assist a State.

149/ This article will require some alteration if the decision is taken to make the obligation to assist reciprocal.

(a) Costs associated to the travel of witnesses or the surrender of an accused or convicted person;

(b) Costs of translation, interpretation and transcription.

Where the execution of a request will result in extraordinary costs, there should be consultations to determine how those costs will be met.

* * *

A. Assistance

Subject to the provisions of paragraph 2 of this article, the procedure by which a State Party discharges its obligation to cooperate shall be governed by its internal law.

The Prosecutor or members of the procuracy may assist with the execution of the request for judicial assistance by the authorities of the requested State. The requested State may authorize them to carry out certain inquiries in its territory.

If the competent authorities of the requested State are no longer able, owing to their lack of organization, to respond to requests for judicial assistance submitted by the Prosecutor, he may request from the Preliminary Investigations Chamber authorization to conduct the necessary inquiries directly in the territory of the requested State. The requested State shall be given prior notification and may submit comments to the Preliminary Investigations Chamber, in particular for the purpose of obtaining an extension of the period for execution of the request for judicial assistance.

Witnesses or experts may not be compelled to testify at the seat of the Court.

If they do not wish to travel to the seat of the Court, their testimony shall be taken in the country in which they reside or in some other place which they may determine by common accord with the Court.

In order to guarantee the safety of witnesses and experts, any means of communication may be used in order to take their testimony while preserving their anonymity.

No witness or expert who appears before the Court may be prosecuted, detained or submitted to any other restriction of personal freedom by the Court.

Notwithstanding the provisions of the second and third sentences of paragraph 1 of this article, any detainee whose appearance as a witness or for the purposes of confrontation is requested by the Court shall, if necessary, be transferred temporarily to the seat of the Court or to the place which it specifies.

If this person must pass in transit through the territory of another State party, the Registrar of the Court shall proceed in accordance with article 68.

A person transferred in this manner shall remain in detention for as long as is necessary for his testimony or confrontation, unless the State in whose territory he was detained requests his release. In such circumstances the Court shall grant the request as soon as possible, and the person may not be prosecuted, detained or subjected to any other restriction of his personal freedom by the Court.

If the State which has transferred the person concerned to the seat of the Court or to the place which it specifies does not request his release, he shall be transferred back to that State as soon as possible after his testimony or confrontation.

B. Transfer

The competent authority of the requested State and the Registrar of the Court shall agree on the date and modalities of the transfer of the person concerned to the seat of the Court or to the place which it specifies.

The duration of the person's detention in the territory of the requested State shall be communicated to the Court and deducted in full from any sentence imposed by the Court.

The requested State may, with the consent of the Preliminary Investigations Chamber, which shall rule after having heard the Prosecutor, defer the transfer of the person in question if he is being prosecuted or serving a sentence in respect of facts different from those for which he is being sought.

If the requested State does not request deferment of the transfer or if such deferment is denied by the Preliminary Investigations Chamber, that State may request the Preliminary Investigations Chamber to return the person concerned after completion of his trial by the Court, in order that he may be prosecuted or serve his sentence in respect of facts different from those for which he has finally been sentenced by the Court.

On the completion of the proceedings or after the person has served his sentence, he may be transferred back to the Court or to the place which it specifies, in order to serve the sentence handed down by the Court. 150/

Articles found in the possession of the suspect or accused shall be handed over to the Court, at its request, at the time of his transfer. This may be done even if the transfer cannot take place owing to the death or escape of the individual sought. The Court shall return such articles free of charge as soon as possible after the trial, if they are the property of a third party or the requested State.

C. Costs

The costs of the transfer of a suspect to the seat of the Court or to the place which it specifies shall be borne by the requested State.

The costs of executing requests for judicial assistance in the territory of States parties shall be borne by them, except with respect to the travel and subsistence costs of the Prosecutor, members of his office or any other member of the Court.

150/ The view was expressed that this provision required further clarification.

The costs of transmitting documents or papers, including urgent transmission, to the seat of the Court or to the place which it specifies shall be borne by the States parties.

The costs of transferring to the seat of the Court, or to the place which it specifies, detainees whose appearance is requested by the Court as witnesses or for the purposes of confrontation shall be borne by the States parties.

The costs of the travel of witnesses or experts to the seat of the Court or to the place which it specifies and the costs of their subsistence shall be borne by the budget of the Court.

The costs of any expert opinion or report requested by the Court shall be borne by the budget of the Court.

PART 8. ENFORCEMENT

Article 58

Recognition of judgements

I. ILC DRAFT

States parties undertake to recognize the judgements of the Court.

II. PROPOSALS

The title of the article should be changed to read:

General Rule 151/

General obligation to recognize judgements [and enforce sentences]

States parties undertake to recognize the judgements of the Court.

* * *

States Parties undertake to abide by the judgements of the Court 152/ and shall enforce the sentences of the Court in their territory. 153/

* * *

States Parties have to recognize the judgements of the Court as judgements rendered by their national authorities.

* * *

1. The States Parties undertake to enforce directly on their territory the decisions handed down by the Court, in accordance with the provisions of this Part.

2. A sentence pronounced by the Court shall be binding on the States Parties, which may in no case modify it, whether by reducing it, or increasing it or by altering its nature.

151/ Under this article four different options are reflected based on different concepts concerning the mode of recognition.

152/ In article 58 of the Siracusa draft, "abide by" appears preferable to "recognize", which appears in ILC draft article 58. The latter conjures up images of special recognition procedures.

153/ At the Preparatory Committee a view was expressed that article 58 should provide not only for "recognition" of judgements, but also for enforcement of sentences. It should be noted that this is merely a statement of a general rule. A further proposal at the Preparatory Committee was to provide reciprocally that the Court shall recognize the judgements of courts of the States Parties. Some delegations felt that this obligation should be subject to certain conditions.

However, if the sentence pronounced by the Court exceeds the maximum sentence for the same offence provided for in the internal law of a State designated by the Presidency under article 149, it may, with the prior and express consent of the Presidency, be reduced by that State to the maximum incurred under its internal law.

Article 59

Enforcement of sentences 154/

I. ILC DRAFT

1. A sentence of imprisonment shall be served in a State designated by the Court from a list of States which have indicated to the Court their willingness to accept convicted persons.

2. If no State is designated under paragraph 1, the sentence of imprisonment shall be served in a prison facility made available by the host State.

3. A sentence of imprisonment shall be subject to the supervision of the Court in accordance with the Rules.

II. PROPOSALS

A. Obligation v. agreement of States Parties to enforce sentences of imprisonment

1. [All States Parties shall assist the Court in enforcing prison sentences by accepting 155/ convicted persons and thus becoming the administering State. A sentence of imprisonment shall be served in a State designated by the Court from the list of available administering States. To that end, the Court shall provide the State so designated with a certified copy of the Court's judgement to be enforced. The State so designated shall promptly inform the Court whether it accepts the request.]

* * *

A sentence of imprisonment shall be served in a State designated by the Court from a list of States which have indicated to the Court their willingness to accept convicted persons. [The Court cannot designate an interested State of a given case as the place of imprisonment.]

* * *

154/ It has been stipulated that there is a strong connection between the items under articles 47 and 55. A view was expressed at the Preparatory Committee that article 58 should not only provide for "recognition" of judgements, but also for enforcement of sentences. It should be noted that this is merely a statement of a general rule. A further proposal at the Preparatory Committee was to provide reciprocally that the Court shall recognize the judgements of courts of the State Parties. Some delegations felt that the obligation should be subject to certain conditions.

155/ "Accepting" creates the possibility that this provision does not create a binding obligation. Should an alternative word be considered?

1. A sentence of imprisonment shall be served in a State designated by the Court from a list of States which have indicated to the Court their willingness to accept convicted persons.

* * *

1. A sentence of imprisonment imposed by the Court shall be served in a State designated by the Presidency from a list of States which have indicated to the Presidency their willingness to accept sentenced persons. Before taking its decision, the Presidency shall request the person sentenced to comment on the matter.

3. Although not included in the list referred to in paragraph 1 of this article, a State may, on a case-by-case basis, either of its own motion or at the request of the Presidency, give its consent to a person sentenced by the court serving his sentence on its territory. It may make its consent subject to the condition referred to in paragraph 2 of this article.

* * *

2. If no State is designated under paragraph 1, the sentence of imprisonment shall be served in a prison facility made available by the host State.

* * *

3. A sentence of imprisonment shall be subject to the supervision of the Court in accordance with the rules [including the rules concerning treatment of prisoners.]

* * *

B. Conditions for accepting convicted persons

4. When imposing a sentence of imprisonment, a Chamber may stipulate that the sentence is to be served in accordance with specified laws as to pardon, parole or commutation of sentence of the State of imprisonment. The consent of the Court is not required to subsequent action by that State in conformity with those laws, but the Court shall be given at least 45 days' notice of any decision which might materially affect the terms or extent of the imprisonment.

* * *

2. A State may make its consent conditional on the applicability of its internal law relating to pardons, conditional release and commutation of sentences to persons sentenced by the Court. Notwithstanding the provisions of article 152, paragraph 1, only the State of detention shall then have competence to apply these measures.

* * *

C. Designation of State by Court

Appropriateness of territorial or national State

Designation of host State

2. If no State is designated under paragraph 1, the sentence of imprisonment shall be served in a prison facility made available by the host State where the Court has its official seat.]

* * *

1. [States parties shall enforce the judgement of the Court on designation by the Registrar on [geographical] criteria formulated by Rules of the Court in accordance with the rule of burden sharing.

2. No designation to enforce shall be notified to the territorial State, or the State of active or passive nationality.]

* * *

4. If no State is designated by the Presidency under paragraphs 1 or 3 of this article, the sentence imposed by the Court shall be served in a prison facility made available by the host State.

D. Consent of convicted person

3. The consent of the sentenced person is not required for the enforcement of a sentence.

* * *

The Court shall admit a plea of nullity based on nullity of the procedure followed in the Trial Chamber with regard to evidence produced in that Chamber, if the nullity is referred to by the President, the Prosecutor or the accused in the course of the proceedings in the Appeals Chamber and has already been raised in the Trial Chamber.

Other defences based on nullity of the procedure followed in the Trial Chamber shall not be admissible.

Defences based on nullity of the summons to appear before the Appeals Chamber must, to be admissible, be raised by the parties at the opening of the proceedings, before the reading of the judgement of the Trial Chamber and of the notice of appeal.

E. Application of national law in enforcement of sentence

4. A sentence of imprisonment shall be subject to the supervision of the Court and be enforced:

(a) as pronounced by the Court; and

(b) in accordance with the applicable law of the administering State.

* * *

1. The conditions of detention shall be governed by the law of the State of detention.

2. A sentence shall be enforced under the supervision of the Presidency.

3. Communications between persons sentenced and the Court shall be free and confidential.

Any sentenced person may address a petition to the Presidency in order to complain about his conditions of detention.

4. The Presidency, having requested any necessary information of the State on whose territory the sentenced person is incarcerated, may, if it believes there are grounds for the petition, take such measures as it deems appropriate in order to modify the conditions of detention of the sentenced person.

The State of detention shall be obliged to enforce these measures.

The Presidency may also, of its own motion or at the request of the sentenced person or the State of detention, decide that the sentenced person be transferred to another State party for the continued serving of his sentence.

F. Enforcement of fines and confiscatory measures [156]

5. The same applies *mutatis mutandis* to the enforcement of fines and confiscatory measures. The proceeds therefrom shall be handed over to the Court which will dispose thereof in accordance with the provisions of paragraph 4 of article 47.

* * *

1. For the purpose of enforcement of fines imposed by the Court, the Presidency may order the forced sale of any property of the person sentenced which is on the territory of a State party.

For the same purpose, the Presidency may order the confiscation of any sum of money or securities belonging to the person sentenced.

2. The sums thus collected shall be disposed of by the Presidency of the Court.

3. The provisions of this article shall apply to legal persons.

G. Competence to review the Court's judgements

6. The Court alone shall have the right to decide on any application for review of the judgement. The administering State shall not impede the sentenced person from making any such application.

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[156] With the exception of paragraph 5, and perhaps paragraph 6, all other provisions of article 59 appear to deal solely with enforcement of sentences of imprisonment. If the remedies of the Court include fines, restitution, compensation and/or confiscation, there may need to be separate articles dealing with enforcement of those remedies (unless a simple "undertake to recognize" approach of ILC article 58 is adopted).

H. Limitation on punishment for other offences

7. A sentenced person in the custody of the administering State shall not be subjected to prosecution or punishment for any conduct committed prior to transfer unless such prosecution or punishment has been agreed to by the Court.

* * *

1. Subject to the provisions of article 67, paragraphs 3 and 4, the State on whose territory a convicted person is serving the sentence imposed by the Court may not prosecute or try him, cause him to serve a sentence imposed by its courts or subject him to any other restriction of his personal freedom for any act committed prior to his incarceration on its territory.

2. However, the Presidency may, at the request of the State of detention, authorize prosecution or the execution of a penalty imposed by the courts of that State. The Presidency shall rule on the matter after having requested the comments of the prisoner.

3. The rule established by paragraph 1 of this article shall cease to have effect if the sentenced person remains more than 30 days on the territory of the State of detention after having served the full sentence imposed by the Court.

* * *

1. Upon designation by the Court, States shall enforce sentences of imprisonment, imposed by the Court. Internationally recognized standards of treatment of prisoners shall thereby be fully guaranteed.

2. In making a designation as referred to in paragraph 1, the Court shall, inter alia, take into consideration reasons of burden sharing, the modalities of which shall be elaborated by the States parties.

3. No designation as referred to in paragraph 1 shall be made with respect to the State where the crime was committed or the State of which the convicted person or the victim is a national, unless the Court explicitly decides otherwise for reasons of social rehabilitation.

4. A sentence of imprisonment shall be subject to the supervision of the Court in accordance with the rules.

* * *

1. A sentence of imprisonment shall be served in a State not involved in the case designated by the Court from a list of States which have indicated to the Court their willingness to accept convicted persons.

2. If no State is designated under paragraph 1, the sentence of imprisonment shall be served in a prison facility made available by the host State.

3. A sentence of imprisonment shall be subject to the supervision of the Court in accordance with the rules concerning the treatment of the prisoners.

Article 60

Pardon, parole and commutation of sentences

I. ILC DRAFT

1. If, under a generally applicable law of the State of imprisonment, a person in the same circumstances who had been convicted for the same conduct by a court of that State would be eligible for pardon, parole or commutation of sentence, the State shall so notify the Court.

2. If a notification has been given under paragraph 1, the prisoner may apply to the Court in accordance with the Rules, seeking an order for pardon, parole or commutation of the sentence.

3. If the Presidency decides that an application under paragraph 2 is apparently well founded, it shall convene a Chamber of five judges to consider and decide whether in the interests of justice the person convicted should be pardoned or paroled or the sentence commuted, and on what basis.

4. When imposing a sentence of imprisonment, a Chamber may stipulate that the sentence is to be served in accordance with specified laws as to pardon, parole or commutation of sentence of the State of imprisonment. The consent of the Court is not required to subsequent action by that State in conformity with those laws, but the Court shall be given at least 45 days' notice of any decision which might materially affect the terms or extent of the imprisonment.

5. Except as provided in paragraphs 3 and 4, a person serving a sentence imposed by the Court is not to be released before the expiry of the sentence.

II. PROPOSALS

The title of the article should be changed to read:

Early release [157]

1. The administering State shall not release the prisoner before the expiry of the sentence as pronounced by the Court.

2. The Court alone shall have the right to decide on the release of a prisoner before the expiry of the sentence and determine the conditions and effects of the release. That decision shall be taken by a Chamber of five judges, who may

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[157] This wording is based on article 60 of the Siracusa draft, which appears to be simpler than the system envisaged under article 60 of the ILC draft. It appears appropriate that the Court should be the authority to decide on matters of pardon, parole and commutation of sentences.

in arriving at their decision take representations by the administering State or any other interested party into account. 158/

3. The prisoner may apply to the Court for a decision according to paragraph 2.

4. When imposing a sentence of imprisonment, a Chamber may stipulate that the sentence is to be served in accordance with specified laws as to early release of the administering State. The consent of the Court is not required to subsequent action by that State in conformity with those laws, but the Court shall be given at least 45 days' notice of any decision which might materially affect the terms or extent of the imprisonment. 159/

* * *

The Court, according to the circumstances, may parole a convict who served his/her sentence:

(a) more than 20 years in case of life imprisonment.

(b) more than two thirds of its term in case of imprisonment for a definite term.

A parole shall be revoked when the parolee commits a further offence during its period and is convicted by this Court.

* * *

1. If, under a generally applicable law of the State of imprisonment, a person in the same circumstances who had been convicted for the same conduct by a court of that State would be eligible for pardon, parole or commutation of sentence, the State shall so notify the Court.

2. If a notification has been given under paragraph 1, the prisoner may apply to the Court in accordance with the rules, seeking an order for pardon, parole or commutation of the sentence.

3. If the Presidency decides that an application under paragraph 2 is apparently well founded, it shall convene a Chamber of five judges to consider and decide whether in the interests of justice the person convicted should be pardoned or paroled or the sentence commuted, and on what basis.

* * *

1. Subject to the provisions of article 149, paragraph 2, if a person sentenced by the Court may benefit from a pardon, parole or commutation of his sentence under the internal law of the State of detention, the latter shall notify the Registrar of the Court and the prisoner of this fact.

158/ The insertion of the last phrase would make clear that representations may be made to the Court concerning the release of the prisoner. In ILC draft article 60 (1) and (2) it was made especially clear that the early release conditions pertaining in the administering State could be taken into account in determining early release.

159/ ILC draft article 60 (4).

The prisoner may also petition the Presidency for a pardon, parole or commutation of his sentence.

The Presidency shall decide whether the prisoner shall be granted a pardon, parole or commutation of his sentence and shall specify the modalities thereof.

The State of detention shall promptly implement the decision of the Presidency, which shall be notified to it and to the prisoner by the Registrar.

2. If the provisions of article 149, paragraph 2, apply, the State of detention shall notify the Registrar of the Court, who shall inform the Presidency, at least 45 days in advance, of any decision that may appreciably alter the duration of the detention.

* * *

5. Except as provided in paragraphs 3 and 4, a person serving a sentence imposed by the Court is not to be released before the expiry of the sentence.

* * *

1. Subject to the provisions of article 149, paragraph 2, if a person sentenced by the Court may benefit from a pardon, parole or commutation of his sentence under the internal law of the State of detention, the latter shall notify the Registrar of the Court and the prisoner of this fact.

The prisoner may also petition the Presidency for a pardon, parole or commutation of his sentence.

The Presidency shall decide whether the prisoner shall be granted a pardon, parole or commutation of his sentence and shall specify the modalities thereof.

The State of detention shall promptly implement the decision of the Presidency, which shall be notified to it and to the prisoner by the Registrar.

2. If the provisions of article 149, paragraph 2, apply, the State of detention shall notify the Registrar of the Court, who shall inform the Presidency, at least 45 days in advance, of any decision that may appreciably alter the duration of the detention.

Article Y [160]

Escape

PROPOSAL

Escape (article 154)

1. In the event of an escape, the Presidency shall request from any State Party the transfer of the convicted person who has escaped.

The provisions of article 66 shall apply to this request for a transfer for the purposes of enforcement of the sentence still to be served, with the exception of the documents accompanying the request, which shall be limited to the decision pronounced by the Court - either the original or a copy certified by the Registrar as a true copy - and as detailed a description as possible of the convicted person.

2. The convicted person shall be transferred as soon as possible after his arrest to the territory of the State in which he was serving his sentence or to another place determined by the Presidency.

The period of detention in the territory of the State where the convicted person was arrested after his escape shall be deducted in full from the sentence still to be served.

3. If the State Party in whose territory the escaped person is arrested agrees, the convicted person may serve the rest of his sentence in that State provided that the Presidency gives its consent.

The application of the provisions of article 149, paragraph 2, shall in that case also be subject to the agreement of the Presidency.

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[160] There is no equivalent of this article in the draft prepared by the International Law Commission.

ANNEX I

Crimes pursuant to Treaties (see article 20 (e))

ILC DRAFT

1. Grave breaches of:

    (i) the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949, as defined by Article 50 of that Convention;

    (ii) the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949, as defined by Article 51 of that Convention;

    (iii) the Geneva Convention relative to the Treatment of Prisoners of War of 12 August 1949, as defined by Article 130 of that Convention;

    (iv) the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949, as defined by Article 147 of that Convention;

    (v) Protocol I Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts of 8 June 1977, as defined by Article 85 of that Protocol.

2. The unlawful seizure of aircraft as defined by Article 1 of the Hague Convention for the Suppression of Unlawful Seizure of Aircraft of 16 December 1970.

3. The crimes defined by Article 1 of the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation of 23 September 1971.

4. Apartheid and related crimes as defined by Article II of the International Convention on the Suppression and Punishment of the Crime of Apartheid of 30 November 1973.

5. The crimes defined by Article 2 of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents of 14 December 1973.

6. Hostage-taking and related crimes as defined by Article 1 of the International Convention against the Taking of Hostages of 17 December 1979.

7. The crime of torture made punishable pursuant to Article 4 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984.

8. The crimes defined by Article 3 of the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation of 10 March 1988 and by Article 2 of the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf of 10 March 1988.

9. Crimes involving illicit traffic in narcotic drugs and psychotropic substances as envisaged by Article 3 (1) of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 20 December 1988 which, having regard to Article 2 of the Convention, are crimes with an international dimension.

Annex II

Procedural questions, fair trial and rights of the accused

Table of ILC draft articles and various proposed articles a/

PART 4. INVESTIGATION AND PROSECUTION

ILC A/49/355	Australia/Netherlands A/AC.249/L.2	France A/AC.249/L.3	Argentina A/AC.249/L.6	Japan A/AC.249/L.7	Japan A/AC.249/L.8	Germany A/AC.249/WP.1	Singapore A/AC.249/WP.2
Art. 25 Complaint	Rule 53, 54	Art. 37, 38(1)					
Art. 26 Investigation of alleged crimes	Rule 52, 55-59	Art. 40, 42, 43, 51, 57(2)	Rule 57 *bis*, 89 *bis*	I(4); II(1)		Art. 26	Art. 26
Art. 27 Commencement of prosecution	Rule 60, 61, 65-68	Art. 25; 44-50; 51(1e); 101; 102; 113(d)	Rule 60, 61, 65	II(7)	Art. 9		Art. 27
Art. 28 Arrest	Rule 69	Art. 51(1), (2); 52; 55; 57(1), (2); 58(2); 59(1), (2)		II(2), (3)			
Art. 29 Pre-trial detention or release	Rule 70, 71, 76, 77	Art. 55(1); 56(1), (2), (3); 58	Rule 77	II(4), (5)	Art. X		
Art. 30 Notification of the indictment	Rule 72	Art. 48(7); 51(1), (2); 55(3); 59(1), (2), (3)		III(3)			

a/ Prepared by the informal group dealing with procedural questions, fair trial and rights of the accused.

ILC A/49/355	Switzerland A/AC.249/WP.4	Netherlands A/AC.249/WP.6	Austria A/AC.249/WP.10	Prep Com A/AC.249/1
Art. 25 Complaint				Page 107-109
Art. 26 Investigation of alleged crimes	Art. 26		Art. 26	Page 96-97
Art. 27 Commencement of prosecution	Art. 27	Art. 27	Art. 27	Page 97-98
Art. 28 Arrest	Art. 28		Art. 28	Page 110-111
Art. 29 Pre-trial detention or release	Art. 29		Art. 29	Page 111-112, 120
Art. 30 Notification of the indictment				

PART 5. THE TRIAL

ILC A/49/355	Australia/Netherlands A/AC.249/L.2	France A/AC.249/L.3	Argentina A/AC.249/L.6	Japan A/AC.249/L.7	Japan A/AC.249/L.8	Switzerland A/AC.249/WP.3	Netherlands A/AC.249/WP.6
Art. 32 Place of trial	Rule 8	Art. 4(2), (3); 103					
		Art. 98-100, 106-110					
Art. 34 Challenges to jurisdiction	Rule 78-81, 128	Art. 36, 39, 69, 70(1), 107, 115, 116	Rule 61(B)			Art. 34, 36	
Art. 35 Issues of admissibility							
Art. 36 Procedure under articles 34 and 35							
Art. 37 Trial in the presence of the accused	Rule 93	Art. 49, 111, 112		III(4)			Art. 37
Art. 38 Functions and powers of the Trial Chamber	Rule 62, 63, 74, 75, 78-87, 90-92, 94-102, 116	Art. 98-101, 104-110, 113, 117-121, 127	Rule 38 bis, 74, 91, 100	III(1), (2)			Art. 38
Art. 39 Principle of legality (nullum crimen sine lege)		Art. 101, 125		I(5)			
Art. 40 Presumption of innocence		Art. 51, 101		I(2)			
Art. 41 Rights of the accused	Rule 4, 51, 52, 84, 85, 100, 115	Art. 51(1), (2); 101, 104	Rule 51, 52, 100	I(1), (3), (4); II(6); III(1), (3), (5), (7)			
Art. 42 Non bis in idem		Art. 35, 131					
Art. 43 Protection of the accused victims and witnesses	Rule 40, 86, 91, 95	Art. 102	Rule 95		Art. X		

ILC A/49/355	Australia/Netherlands A/AC.249/L.2	France A/AC.249/L.3	Argentina A/AC.249/L.6	Japan A/AC 249/L.7	Japan A/AC.249/L.8	Switzerland A/AC.249/WP.3	Netherlands A/AC.249/WP.6
Art. 44 Evidence	Part III, Sect. 3; Rule 105, 106, 108-115	Art. 105, 114, 122, 125	Rule 89 bis, 106, 112, 113	II(6); III(6), (7); IV(1)-(5)			Art. 44
Art. 45 Quorum and judgement	Rule 103, 104	Art. 45, 127-130	Rule 104	III(6)			
Art. 46 Sentencing	Rule 118-119	Art. 94(2)		III(8)			

ILC A/49/355	Singapore A/AC.249/WP.7	New Zealand A/AC.249/WP.8	Switzerland A/AC.249/WP.9	Austria A/AC.249/WP.10	Egypt A/AC.249/WP.11	Singapore A/AC.249/WP.13	Argentina A/AC.249/WP.16
Art. 32 Place of trial							
Art. 34 Challenges to jurisdiction				Art. 34, 36			
Art. 35 Issues of admissibility							
Art. 36 Procedure under articles 34 and 35							
Art. 37 Trial in the presence of the accused			Art. 37				
Art. 38 Functions and powers of the Trial Chamber	Art. 38						Art. 38
Art. 39 Principle of legality (nullum crimen sine lege)							
Art. 40 Presumption of innocence							
Art. 41 Rights of the accused		Art. 41					Art. 41
Art. 42 Non bis in idem							
Art. 43 Protection of the accused, victims and witnesses					Art. 43		Art. 43
Art. 44 Evidence							
Art. 45 Quorum and judgement						Art. 45	
Art. 46 Sentencing							

ILC A/49/355	Canada A/AC.249/WP.21	Italy A/AC.249/WP.31	Germany A/AC.249/WP.37	United States A/AC.249/WP.41	A/AC.249/WP.__	A/AC.249/WP.__	Prep Com A/AC.249/1
Art. 32 Place of trial							
Art. 34 Challenges to jurisdiction							Page 98 (Sect. VI, VII) [Art. 34(b), 35]
Art. 35 Issues of admissibility							Page 100 [alternate Art. 35(2)]
Art. 36 Procedure under articles 34 and 35							Page 101 (Sect. VII-VIII) [Art. 35(4), 36(3)]
Art. 37 Trial in the presence of the accused		Art. 37					Page 131 [Art. 37]
Art. 38 Functions and powers of the Trial Chamber							
Art. 39 Principle of legality (nullum crimen sine lege)							
Art. 40 Presumption of innocence							
Art. 41 Rights of the accused				Art. 41			
Art. 42 Non bis in idem							
Art. 43 Protection of the accused, victims and witnesses							
Art. 44 Evidence			Art. 44(a)				
Art. 45 Quorum and judgement	Art. 45						
Art. 46 Sentencing							

PART 6. APPEAL AND REVIEW

ILC A/49/355	Australia/Netherlands A/AC.249/L.2	France A/AC.249/L.3	Argentina A/AC.249/L.6	Japan A/AC.249/L.7	Netherlands A/AC.249/WP.6	Singapore A/AC.249/WP.13	A/AC.249/WP.__
Art. 48 Appeal against judgement or sentence	Rule 78(b), 117, 120	Art. 132-135		V(1)	Art. 48	Art. 48	
Art. 49 Proceedings on appeal	Rule 126-143	Art. 136-143	Rule 142	V(3)			
Art. 50 Revision	Rule 144	Art 44-147	Rule 74, 144	V(2), (3)			

ANNEX III

Working paper prepared by interested delegations regarding Part 7*

PART 7. INTERNATIONAL COOPERATION AND JUDICIAL [LEGAL] [MUTUAL] a/ ASSISTANCE

[Article X

Obligation to cooperate and general provisions b/

General obligation to cooperate

1. States parties shall, in accordance with the provisions of this Part, cooperate with the Court in its investigation and prosecution of crimes under this Statute. A State shall not deny a request for cooperation except as specifically provided in this Part.

* * *

States Parties and the Court shall afford each other reciprocal cooperation and mutual assistance in connection with criminal investigations and proceedings under this Statute.

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* Note. This annex contains a working paper prepared by interested delegations. It neither represents a text agreed upon among delegations nor suggests that every item should be included in the Statute. It identifies possible elements to be considered for inclusion, with alternative views of some of those elements, and examples of some possible texts. The order of the articles as well as the headings are only of an indicative character and have not been finally agreed upon. Because of time constraints, it was not possible to reflect all formulations or the results of substantive discussions of proposals. The working paper aims at helping the reading and further discussion of the compilation of proposals on judicial cooperation, and is not intended in any way to prejudice the future positions of delegations.

a/ Not all assistance is necessarily provided by judicial authorities; also there is a question whether use of term "judicial" assistance would limit the ability of the Prosecutor to request assistance directly. "Mutual assistance", which is developing into a term of art, may be a better option but is more commonly used with respect to truly reciprocal cooperation between States (the issue of reciprocal cooperation by the Court being itself a topic of discussion). "Legal" assistance is a third option.

b/ This provision reflects the need for a general statement of the obligation of States to cooperate with the Court, and related matters.

Channels for communication of requests/Authorities competent to make and receive requests c/

2. Requests for cooperation may be made by the Court [or Prosecutor] and shall be transmitted [by the Registrar] through diplomatic channels, unless the Court and the requested State agree on another mode for transmitting the requests.

* * *

Each State Party shall designate at the time of deposition of its instruments of ratification, the national authority competent to receive requests for cooperation transmitted by the Court [, and such authorities to which requests for cooperation may be submitted in cases of urgency,] and the means of transmission of requests.

States Parties' failure to cooperate d/

3. Where non-cooperation by States with requests by the Court [or Prosecutor] prevents the Court from performing its duties in terms of this Statute, [the Preliminary Investigations Chamber of] the Court may request the Security Council to take the measures necessary to enable the Court to exercise its jurisdiction, in relation to both States Parties to this Statute, or States not parties.

Cooperation by non-States Parties e/

4. The Court may call on any State not party to this Statute to provide assistance provided for in this Part on the basis of comity, an ad hoc arrangement, or through entry into agreement with such State.]

Article 51

Cooperation and judicial [legal] [mutual] assistance

1. States Parties shall, in accordance with the provisions of this article [and their national law], comply with requests for judicial [legal] [mutual]

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c/ The two alternatives are not necessarily mutually exclusive of each other in all respects.

d/ The Working Group notes that there has been little discussion of the failure of States Parties to cooperate with the Court. The possibility of referral to the Security Council, reflected above, has been the only approach subject of a written proposal to date.

e/ Some proposals treat cooperation with non-States Parties as a separate article. The ILC draft and certain other proposals referred to the possibility of cooperation of non-States Parties. This text takes the approach of providing explicit authority for the Court to request cooperation, leaving the reaction of the requested State open. It also provides clear authority for the Court to enter into agreements or ad hoc arrangements with non-States Parties.

assistance by the Court, which assistance shall include [but is not limited to] f/

(a) the identification and whereabouts of persons or the location of items;

(b) the taking of testimony, including testimony under oath, and the production of evidence, including expert opinions or reports necessary to the Court;

(c) the service of [procedural] documents;

(d) facilitating the appearance of persons before the Court;

(e) the temporary transfer of persons in custody, with their consent, in order to provide testimony or other assistance to the Court;

(f) the conduct of on-site investigations, inspections and expert examination;

(g) the conduct of proceedings of the Court in its territory;

(h) executing searches and seizures;

(i) provision of records and documents;

(j) taking action to protect victims and witnesses and the integrity of evidence;

(k) identifying, freezing and forfeiture of proceeds and instrumentalities of crimes; and

(l) any other assistance not prohibited by the law of the Requested State.

2. Grounds for refusal.

[A State Party may deny a request for assistance, in whole or in part, if - g/

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f/ [The enumeration of types of assistance above is not intended in any way to limit or otherwise prejudice the rights of the Prosecutor or Court to exercise their powers and duties as described in Article 26 or other provisions of this Statute, or to seek the cooperation of States Parties in doing so.] If the list of forms of assistance contains a final "catch-all" clause, the phrase "but not limited to" may not be necessary.

The purpose of the list was to include in substance the various types of assistance set out in written proposals, rather than to select among them.

g/ This list is not an exhaustive one, but attempts to reflect some of the more frequently raised possible grounds for denial of requests for assistance. Other bases for denial that could be considered would include, but are not limited, to ne bis in idem, dual criminality, expiry of statute of limitations.

(a) with respect to a crime under [article 20 (b) through (e)] [Article 20 (e)], it has not accepted the jurisdiction of the Court; h/

(b) the authorities of the requested State would be prohibited by its domestic laws from carrying out the action request with regard to the investigation or prosecution of a similar offence in that State;

(c) execution of the request would seriously prejudice its security [, ordre public] or other of its essential interests;

(d) the request is manifestly ungrounded;

(e) execution of the request would interfere with an ongoing investigation or prosecution requested State or in another State [or with a completed investigation or prosecution that might have led to an acquittal], except that a request may not be denied if the investigation or prosecution relates to the same matter which is the subject of the request and the Court has determined that the case is admissible under article 35;

[(f)] Compliance with the request would put it in breach of an existing [international law] [treaty] obligation undertaken to another [State] [non-State party]] i/

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h/ The final wording of such a paragraph, if it is retained, may depend on which crimes are ultimately included under the jurisdiction of the Court, the extent to which an "opting" (or consent regime) as to jurisdiction is included, and the extent to which the Court might be deemed to have inherent jurisdiction. The brackets suggest two possible approaches, if such a provision is deemed appropriate: one where acceptance of jurisdiction could be a consideration with respect to all crimes but genocide, the other where it would be a consideration only with respect to treaty crimes.

i/ Consideration should be given to the relationship between the obligations of States Parties to cooperate with the Court and their other existing but inconsistent international law obligations, e.g. arising from bilateral extradition treaties, the Vienna Convention on Diplomatic Relations, etc.

If a breach of another international law obligation is a ground for denying assistance, what is its precise scope?

(a) Is it confined to obligations owed to non-States Parties only?

As between States Parties to the Court, participation in the Statute could override earlier inconsistent treaty obligations (see article 30 of the 1969 Vienna Convention on the Law of Treaties) but would it be desirable to have an express provision in the Statute stating so?;

(b) Is it confined to obligations arising out of treaties only?; and

(c) Does it cover requests for arrest and transfer (e.g., requests for the surrender of a foreign diplomat accredited to the requested State party) or only requests for other forms of assistance (e.g., search and seizure on diplomatic premises)?

[When ratifying this Statute, States Parties shall notify the Secretary-General of the United Nations of the conditions under which they would refuse assistance and shall specify elements which must be included in a written request. States Parties shall not refuse assistance for reasons other than those indicated.] j/

* * *

[3. A State may not deny a request for assistance, in whole or in part, on the grounds that:

(a) the act constituting the offence to which the request relates does not constitute an offence under the laws, regulations or ordinances of the requested State;

(b) the offence is a political or military offence, or an offence connected to such an offence; or

(c) the requested State does not deem it appropriate to honour the request.]

4. Before denying a request for assistance, the requested State shall consider whether the requested assistance can be provided subject to specified conditions, or whether the assistance can be provided at a later time or in an alternative manner; k/ provided that if the Court or the Prosecutor accepts the assistance subject to conditions, it shall abide by them.

5. Confidentiality.

The Court shall ensure the confidentiality of evidence and information except as required for the investigation and proceedings described in the request.

[(a) The requested State may, when it deems it to be in its interest, transmit documents, files or information to the Prosecutor on a confidential basis. The Prosecutor may then use them only for the purpose of collecting new evidence.

[(b) The requested State may automatically or at the request of the Prosecutor subsequently authorize the publication of such documents, papers, files or information.]

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j/ This proposal contemplates, however, that certain grounds would be excluded as bases for denying request, such as those set out in paragraph 3 below.

k/ In this regard it is conceivable that testimony could, for instance, be recorded electronically and made available to the Court in this format. It should be considered whether it is necessary to include a specific provision to the effect that the Court will be allowed to receive and consider such testimony.

[6. Reciprocity. l/

[If requested, the Court shall reciprocally cooperate with and provide assistance to a State Party conducting an investigation into actions which constitute a crime under this Statute.]

* * *

[(a) The States Parties may, for the purposes of a current investigation or a legal proceeding, request the Court to transmit papers or documents obtained in the course of an investigation or a legal proceeding conducted by the Court.

(b) If such papers or documents have been obtained with the assistance of a State, that State must give its prior consent to any communication addressed to the requesting State. It shall be invited, at the request of the Preliminary Investigations Chamber and through the Registrar, to make its decision known.

(c) In the case of the testimony of a witness or expert, such witness or expert must also give his prior consent to any communication addressed to the requesting State. He shall be invited to do so at the request of the Preliminary Investigations Chamber and through the Registrar.

(d) The Preliminary Investigations Chamber shall grant the request after having obtained the necessary consents.

(e) The Preliminary Investigations Chamber may, under the same conditions, grant such a request from a State non-party. In taking its decision it shall bear in mind the behaviour of that State in connection with earlier requests for cooperation addressed to it by the Court and the interests of justice.]

Article 53

[Surrender] [Extradition] [Transfer] m/ of accused or convicted persons n/ to the court

1. Transmittal of requests; obligation of States.

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l/ In view of the issue of reciprocity having been inserted in the general provision (article X), this whole provision has been inserted in square brackets to highlight the necessity to reconsider whether a separate provision should be retained.

m/ There is an issue of what is the appropriate term for the process of delivering accused or convicted persons to court, and whether that process is sui generis, or more in the vein of traditional extradition. The use of the term "surrender" here does not denote any choice of approach, but is used as a matter of convenience and is to be broad enough to encompass either approach.

n/ It is conceivable that convicted persons may be at large for some reason. It may therefore be necessary to provide for the arrest of such convicted persons. Although this aspect is dealt with under this article, it has been pointed out that it may be more appropriate to deal with this aspect under article 59 (Enforcement of sentences).

The [Court] [Prosecutor] [Registrar] shall transmit to any State on the territory of which the accused or convicted person may be found, a request for the surrender of that person, along with the supporting material outlined in article 53 bis, and shall request the cooperation of that State in the arrest and surrender of such person. States Parties shall, in accordance with the provisions of this article [and their national law], comply with requests for surrender without delay.

2. Grounds for refusal.

[A State Party may deny a request for surrender, if o/

(a) with respect to a crime under [article 20 (b) through (e)] [article 20 (e)], it has not accepted the jurisdiction of the Court; p/

(b) the person is a national of the requested State;

(c) the person is being proceeded against or has been proceeded against, convicted or acquitted in the requested State or another State for the offence for which his surrender is sought, except that a request may not be denied if the Court has determined that the case is admissible under article 35.

(d) the request is manifestly unfounded;

(e) compliance with the request would put it in breach of an existing [international law] [treaty] obligation undertaken to another [State] [non-State party] q/

[When ratifying this Statute, States Parties shall notify the Secretary-General of the United Nations of the conditions under which they would refuse [provisional arrest or] surrender and shall specify elements which must be included in a written request. States Parties shall not refuse surrender for reasons other than those indicated.] r/

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o/ This list is not an exhaustive one, but attempts to reflect some of the more frequently raised possible grounds for denial of requests for surrender. Other bases for denial that could be considered would include, but are not limited, to non bis in idem, dual criminality, expiry of statute of limitations.

p/ The final wording of such a paragraph, if it is retained, may depend on which crimes are ultimately included under the jurisdiction of the Court, the extent to which an "opting" (or consent regime) as to jurisdiction is included, and the extent to which the Court might be deemed to have inherent jurisdiction. The brackets suggest two possible approaches, if such a provision is deemed appropriate: one where acceptance of jurisdiction could be a consideration with respect to all crimes but genocide, the other where it would be a consideration only with respect to treaty crimes.

q/ See footnote i/ above.

r/ This proposal contemplates, however, that certain grounds would be excluded as bases for denying request, such as those set out in paragraph 3 below.

[OR]

[The extradition legislation of a requested State may be relied upon by that State as a basis for denying a request for surrender.]

* * *

[3. Impermissible grounds for refusal.

A State may not deny a request for assistance, in whole or in part, on the grounds that:

(a) the act constituting the offence to which the request relates does not constitute an offence under the laws, regulations or ordinances of the requested State;

(b) the offence is a political or military offence, or an offence connected to such an offence; or

(d) the person is a national of the requested State;

[(e) [the requested State has substantial grounds for believing that the request for surrender has been made for the purpose of prosecuting or punishing the person on account of that person's race, religion, nationality, ethnic origin, political opinions, sex or status, or that person's position may be prejudiced for any of those reasons;]

* * *

[the requested State has grounds for believing that the person whose extradition is requested has been or would be subjected in the Court to torture or cruel, inhuman or degrading treatment or punishment or if that person has not received or would not receive minimum guarantees in a criminal proceeding, as is contained in the International Covenant on Civil and Political Rights, article 4;]

(f) the requested State does not deem it appropriate to honour the request.]

4. Parallel requests from the Court and State(s).

[A State Party [, if it is a Party to the treaty covered by article 20 (e) and has accepted the jurisdiction of the Court,] shall [undertake to] give priority to surrender the accused to the Court over requests for extradition from other States [Parties].

* * *

[If the requested State also receives a request from a State [State Party] [to which it is bound by an extradition agreement] for the extradition of the same person, either for the same offence or for a different offence for which the Court is seeking the person's surrender, the appropriate authority of the requested State shall determine whether to surrender the person to the Court or to extradite the person to the State. In making its decision the requested State shall consider all relevant factors, including but not limited to:

[(a) whether the extradition request was made pursuant to a treaty;]

(b) the respective dates of the requests;

(c) if the offences are different, the nature and gravity of the offences;

(d) the interests of the State requesting extradition, including, where relevant, whether the offence was committed in its territory and the nationality of the victims of the offence; and

(e) the possibility of subsequent surrender or extradition between the Court and the State requesting extradition.

The requested State may not, however, deny a request for the surrender made under this article in deference to another State's request for extradition of the same person for the same offence, if the State requesting extradition is a State Party, and the Court has ruled the case before it admissible, and its decision took into consideration the proceedings in that State which gave rise to its extradition request.]

5. Proceeding in requested State.

Where the law of the requested State so requires, the person whose surrender is sought shall be entitled to challenge the request for arrest and surrender in the court of the requested State on the following grounds:

(a) lack of jurisdiction of the International Criminal Court;

(b) non bis in idem; or

(c) the evidence submitted in support of the request would not be sufficient to commit him for trial for such an offence in a court of the requested State.

6. Delayed or temporary surrender.

(a) If the person sought is being proceeded against or is serving a sentence in the requested State for an offence different from that for which his surrender to the Court is sought, the requested State may [with the consent of the Preliminary Investigations Chamber, which shall rule after having heard the Prosecutor,]

(i) delay the surrender of person until the prosecution has been completed or abandoned or the sentence has been served, at which time the person shall be surrendered to the Court; or

(ii) temporarily surrender the person to the Court;

(b) if the surrender of the person is not delayed, the requested State may request the [Court] [preliminary Investigations Chamber] to return the person after the completion of his trial by the Court, in order that he may be prosecuted or serve his sentence in the requested State.

7. Extradite or prosecute obligation.

(a) [In the case of a crime to which article 20 (e) applies,] the requested State [, if it is a party to the treaty in question but has not accepted the Court's jurisdiction with respect to that crime] shall, where it decides not to surrender the accused to the Court, promptly take all necessary steps to extradite the accused to a State having requested extradition or [at the request of the Court] refer the case [through proceedings in accordance with national laws] to its competent authorities for the purpose of prosecution.

[This provision shall not apply in the following cases:

[(i) if it is deemed that under the laws, regulations or ordinances of the requested State it would be impossible to impose or to execute punishment upon the person; if the act constituting the offence for which surrender is requested was committed in the territory of the requested State; or if the trial therefore would be held in a court of the requested State;

[(ii) if there is no probable cause to suspect that the person has committed an act which constitutes an offence for which surrender is requested;]

(b) The surrender of an accused to the Court constitutes, as between States Parties which accept the jurisdiction of the Court with respect to the crime in question, compliance with a provision of any treaty requiring that a suspect be extradited or the case be referred to the competent authorities of the requested State for the purpose of prosecution.

8. Provision of evidence irrespective of surrender.

To the extent permitted under the law of the requested State and subject to the rights of third parties, all [property] found in the requested State that has been acquired as a result of the alleged offence or that may be required as evidence shall, upon request, be transmitted to the Court if surrender is granted, even if the surrender cannot be carried out, on conditions to be determined by the Court.

9. Transit of surrendered person.

(a) A State Party shall [, in accordance with its national laws,] authorize transportation through its territory of a person being surrendered to the Court by another State. A request by the Court for transit shall be transmitted through diplomatic channels, unless otherwise agreed. The request for transit shall contain a description of the person being transported and a brief statement of the facts of the case [and their legal characterization, and the warrant for arrest and transfer]. A person in transit shall be detained in custody during the period of transit.

(b) [No authorization is required where air transportation is used and no landing is scheduled on the territory of the State of transit.]

* * *

[If air transport is used an no intermediate landing is envisioned, the Court shall notify the State over whose territory the aircraft will fly and certify the existence of the documents referred to in paragraph (a)]

If an unscheduled landing occurs on the territory of the State of transit, it [may require] [the Court shall submit] a request for transit as provided for in subparagraph (a). The State of transit shall detain the person to be transported until the request for transit is received and the transit is effected, so long as the request is received within 96 hours of the unscheduled landing.

(c) The transit of the person shall not be effected through a territory where there are grounds for believing that his life or liberty may be threatened by reason of his race, religion, nationality or political asylum.

(d) The transit of a national may be refused.

10. Arrangements for surrender.

The competent authority of the requested State and the [Court] [Prosecutor] [Registrar] shall agree on the date and arrangements for the surrender of the person concerned to the seat of the Court or to the place which it specifies.

Article 53 bis

1. A request for arrest or surrender [duly signed by the Prosecutor] shall:

(a) be made by letter, fax, e-mail or any medium capable of delivering a written record (provided that a request shall be confirmed through the diplomatic channel):

(b) contain or be supported by:

(i) information describing the person sought, sufficient to identify the person and information as to that person's probable location;

(ii) in the case of a request for pre-indictment arrest:

- a. a copy of the warrant for arrest;
- b. a statement of the reasons to believe the suspect may have committed a crime within the jurisdiction of the Court and that the Prosecutor expects to seek an indictment within [90] days;
- c. a brief summary of the facts of the case;
- d. a statement as to why pre-indictment arrest is urgent and necessary.

(iii) in the case of a request for post-indictment arrest and surrender of a person not yet convicted:

- a. a copy of the warrant of arrest and indictment;
- b. such information, documents or statements outlining the facts of the case as may be required by the law of the requested State.

(iv) in the case of a request for the arrest and surrender of a person already convicted:

- a. a copy of any warrant of arrest for that person;
- b. a copy of the judgment of conviction;
- c. information to demonstrate that the person sought is the person referred to in the judgment of conviction;
- d. (if the person sought has been sentenced) a copy of the sentence imposed and a statement of any time already served and that remaining.

2. Where the requested State Party considers the information provided insufficient to allow it to comply with the request it may seek, without delay, additional information.

Article 53 ter

(a) In case of urgency, the Court may request the provisional arrest of the person sought pending presentation of the request for surrender and supporting documents under paragraph 53 bis.

(b) The request for provisional arrest shall contain:

(i) a description of the person sought and information regarding the probable location of such person;

(ii) a brief statement of the essential facts of the case, including, if possible, the time and location of the offence;

(iii) a statement of the existence of a warrant of arrest or a judgement of conviction against the person sought, and a description of the specific offence or offences with which the person has been charged or for which he has been convicted; and

(iv) a statement that a request for surrender of the person sought will follow.

(c) A person who is provisionally arrested may be discharged from custody upon the expiration of [ ] s/ days from the date of provisional arrest if the requested State has not received the formal request for surrender and the supporting documents specified under paragraph [ ]. However, the person may consent to surrender before the expiration of this period if the legislation of the requested State so allows, in which case that State shall proceed to surrender the person to the Court as soon as possible.

(d) The fact that the person sought has been discharged from custody pursuant to paragraph (c) shall not prejudice the subsequent rearrest and surrender of that person if the request for surrender and supporting documents are delivered at a later date.

Article 55

Rule of speciality

Limit on other proceedings against surrendered person

1. A person [surrendered to the Court under article 53] [extradited under this Statute] shall not [except under any one of the following circumstances] be proceeded against/prosecuted [tried], sentenced/punished or detained for [any crime] [an offence] other than that for which [the person has been surrendered] [extradition was effected]:

[(a) when a person extradited commits an offence after extradition;

(b) when a requested State has consented to his detention, prosecution, trial or punishment for an offence other than that for which extradition has been effected.]

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s/ Some delegations have proposed a 30-day time period and some a 60-day time period.

Limit on other uses of evidence

2. [A State providing evidence under this Part] [Evidence provided by States Parties under this Statute] [may require that the evidence not be used] [shall not be used] [for any purpose] [in connection with any offence] other than that [for which it was provided] [which is mentioned in the request for assistance as being a subject of investigation] unless [this is necessary to preserve a right of the accused under article 41 (2)] [the requested State offers its consent]. t/

Waiver of rule by requested State

3. The Court may request the State concerned to waive the requirements of paragraphs 1 or 2, for the reasons and purposes to be specified in the request. In a case of paragraph 1, the request shall be accompanied by an additional warrant of arrest and by a legal record of any statement made by the accused with respect to the offence. u/

Article 57

Form and contents of the request

1. Requests for judicial [mutual] [legal] assistance shall:

(a) be made by letter, fax, e-mail or any medium capable of delivering a written record [, provided that a request shall be confirmed through the diplomatic channel];

(b) be in [accompanied by a duly certified translation] an official language of the requested State.

(b (bis)) be in one of the two languages referred to in article 25 in accordance with the choice made by that State.

(c) contain the following, as applicable:

(i) a [brief] statement of the purpose of the request and the assistance sought including the legal basis [and grounds] for the request;

(ii) as much detailed information as possible about the location or identification of any person or place that must be found or identified in order for the assistance sought to be provided;

(iii) a [brief] description of the [essential] facts underlying the request including a statement explaining the nexus between the assistance sought and the matter under investigation or subject to prosecution;

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t/ The Preparatory Committee expressed general satisfaction with the limited rule contained in article 55 (2) of the ILC draft. The first alternative reflects the wording of article 55 (2) of the Siracusa draft.

u/ Siracusa draft article 55 (3). The Preparatory Committee emphasized that the exception to the rule should be based on the express consent or waiver given by the State involved.

(iv) information concerning the complaint or charge to which the request relates and of the basis of the Court's jurisdiction;

(v) such information as may be required under the law of the requested State in order to execute the request;

(vi) any other information relevant to the assistance being sought.

Article 57 bis

Execution of requests v/

1. Requests for assistance shall be executed as expeditiously as possible and the results transmitted to the requesting Party.

2. Requests for assistance shall be executed in accordance with the law of the requested State except that the requested State shall execute the request in the manner specified in the request, including following any procedures outlined therein or permitting persons specified in the request to be present at and assist in the execution process; unless prohibited by the law of that State.

3. The ordinary costs for execution of requests shall be borne by the requested State except for the following which should be borne by the requesting Party:

(a) Costs associated to the travel of witnesses or the surrender of an accused or convicted person;

(b) Costs of translation, interpretation and transcription.

Where the execution of a request will result in extraordinary costs, there should be consultations to determine how those costs will be met.

Article 59

Enforcement of sentences

1. Obligation versus agreement of States Parties to enforce sentences of imprisonment

[On designation by the Court] [a State not involved in the case, taken from a list of States] [all States Parties] [which have indicated to the Court their willingness thereto] shall assist the Court in enforcing prison sentences [by accepting convicted persons and thus becoming the administering State. To that end, the Court shall provide the State so designated with a certified copy of the Court's judgement to be enforced. The State so designated shall promptly inform the Court whether it accepts the request.]

2. Criteria for designation

In making a designation [as referred to in paragraph 1] the Court [the Registrar] shall take into consideration [[geographical] criteria formulated by

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v/ This article will require some alteration if the decision is taken to make the obligation to assist reciprocal.

Rules of the Court] in accordance with the rule of burden sharing [the modalities of which shall be elaborated by the States Parties].

No designation [as referred to in paragraph 1] shall be made with respect to the State where the crime was committed or the State of which the convicted person or the victim is a national, [unless the Court explicitly decides otherwise for reasons of social rehabilitation].

3. Provision in case no detention facilities are made available

[If no State is designated [under paragraph 1] the sentence of imprisonment shall be served in a prison facility made available by the host State [where the Court has its official seat].]

4. No consent of convicted person

The consent of the convicted person is not required for enforcement of a sentence.

5. Role of the Court, national law and international standards in enforcement of sentences

1. A sentence of imprisonment [shall be subject to the supervision of the Court [the Presidency]] [in accordance with the rules [concerning the treatment of prisoners]] and be enforced:

(a) as pronounced by the Court;

(b) in accordance with the applicable law of the administering State.

[The conditions of detention shall be governed by the law of the State of detention.]

[Internationally recognized standards of treatment of prisoners shall thereby be fully guaranteed.]

2. Communications between persons sentenced and the Court shall be free and confidential. Any sentenced person may address a petition to the Presidency in order to complain about his condition of detention.

3. The Presidency [The Court], having requested any necessary information of the State on whose territory the sentenced person is incarcerated, may, if it believes there are grounds for the petition, take such measures as it deems appropriate in order to modify the conditions of detention of the sentenced person. The State of detention shall be obliged to enforce these measures. The Presidency [The Court] may also, of its own motion or at the request of the sentenced person or the State of detention, decide that the sentenced person be transferred to another State Party for the continued serving of his sentence.

6. Enforcement of fines and confiscatory measures

[The same applies mutatis mutandis to the enforcement of fines and confiscatory measures. The proceeds therefrom shall be handed over to the Court which will dispose thereof in accordance with the provisions of paragraph 4 of article 47.]

[For the purpose of enforcement of fines imposed by the Court, the Presidency may order the forced sale of any property of the person sentenced which is on the territory of a State Party. For the same purpose, the Presidency may order the confiscation of any sum of money or securities belonging to the person sentenced.]

7. Review

The Court alone shall have the right to decide on any application for review of the judgement. The administering State shall not impede the sentenced person from making any such application.

8. Limitation on prosecution/Punishment for other offences

A sentenced person in the custody of the administering State shall not be subjected to prosecution or punishment for any conduct committed prior to transfer unless such prosecution or punishment has been agreed to by the Court.